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ABSTRACT

The enactment of the Americans with Disabilities Act (ADA) in July, 1990 created the need for rehabilitationists to have a thorough knowledge of the provisions of this complex legislation. This document, divided into five lessons, examines issues from the perspective of the rehabilitation professional. Lesson 1, "Introduction and Overview" (Ronald R. Schmidt), provides a brief history of the law and then discusses its potential impact on societal attitudes and the rehabilitation profession in general. Part 1 of Lesson 2 (Jill Adams), "The Law of the ADA: Terminology and Regulations," explores the employment provisions of Title I and outlines legal definitions while part 2 focuses on public accommodations and the remaining ADA provisions. Lesson 3 includes two parts: "Accommodations for Workers with Physical Disabilities" (Joseph E. Havranek) and "Accommodations for Workers with Psychiatric Disabilities" (Laura Mancuso). Lesson 4, "Vocational Assessment and the ADA: Issues and Approaches for the Rehabilitation Professional" (Stephen W. Thomas), interprets those sections of ADA pertinent to vocational assessment and also suggests practical approaches to implementing appropriate evaluation strategies. Lesson 5, "ADA and State/Federal Rehabilitation: A Dawn of Change" (John Fenoglio) is a discussion of how the ADA will affect rehabilitation systems in the public sector. An appendix contains the text of the law itself. (BF)

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ED 377 415

UNDERSTANDING THE Americans with Disabilities Act

PRESENTED BY DIRECTIONS IN REHABILITATION

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Special thanks to Lloyd R. Goodwin, Jr., PhD, CRC for his invaluable assistance in the creation of *Understanding the ADA*.

Thanks also to the President's Commission on Employment of People with Disabilities and JAN for supplying supplemental materials to be distributed with the course.

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EDITOR'S NOTE

The enactment of the Americans with Disabilities Act on July 26, 1990, was an event unparalleled in the field of rehabilitation. Regardless of the individual's own political response to the ADA's provisions, the practice of each rehabilitationist will most likely be altered significantly.

The need for rehabilitationists to have a thorough knowledge of the provisions of this complex legislation was emphasized as the ADA went into effect on July 26, 1992. *Understanding the ADA* was developed in response to overwhelming requests by participants in *Directions in Rehabilitation Counseling* in late 1991 and early 1992 who needed to understand the ADA's implications for the rehabilitation profession. How will the law affect day-to-day client evaluation, assessment, and counseling? Will the relationship between the rehabilitationist and the prospective employer be restructured significantly? Which clients will be covered under the ADA? How does one determine which accommodations are "reasonable" and which constitute "undue hardship"?

Understanding the ADA addresses these issues specifically from the perspective of the rehabilitation professional. Lesson 1, "Introduction and Overview," provides a brief overview of the history of the law and then discusses its potential impact on societal attitudes and the rehabilitation profession in general.

Part 1 of Lesson 2, "The Law of the ADA: Terminology and Regulations," explores the employment provisions of Title I and outlines the legal definitions of specific terms such as "impairment," "substantially limits," "covered entity," "essential job functions," and "reasonable accommodation." Part 2 of this lesson focuses on public accommodations and the remaining ADA provisions. Since Title I is likely to be of greater concern to the rehabilitation professional, review questions will focus exclusively on employment. However, a discussion of Titles II–V (public accommodations, the public sector, transportation, and telecommunications) is also included to ensure a thorough understanding of the law in its entirety.

Rehabilitationists will need to be creative in fulfilling the goals of the ADA. Private-sector employers will require a great deal of assistance in finding "reasonable accommodations" to enable covered workers to perform their jobs to the fullest possible extent. Lesson 3 addresses accommodations in two parts: Part 1, "Accommodations for Workers with Physical Disabilities," explores the inequities faced by persons with physical disabilities and presents workplace accommodations to help reduce those obstacles. Part 2, "Accommodations for Workers with Psychiatric Disabilities," describes the particular stigma experienced by workers with psychiatric disabilities. Since the law itself provides little guidance, Part 2 presents a number of creative accommodations that precisely target some of the functional limitations common to psychiatric disorders.

Lesson 4, "Vocational Assessment and the ADA: Issues and Approaches for the Rehabilitation Professional" focuses on the assessment process. It interprets those sections of the ADA pertinent to vocational assessment and also suggests practical approaches to implementing appropriate evaluation strategies. This lesson includes a section on using testing methods to determine "substantial limitation" and provides suggestions for interpreting test results with respect to the ADA.

Understanding the ADA concludes with a discussion of how the ADA will affect rehabilitation systems in the public sector. Lesson 5, "ADA and State/ Federal Rehabilitation: A Dawn of Change" was written by one of the former directors of the Texas Rehabilitation Commission. In November of 1990, the TRC launched a pro-active program which came to be nationally known as ADA-Texas. ADA-Texas had the dual goals of providing ADA training to the rehabilitation staff in Texas and in making this training financially self-supporting. This lesson relates the steps taken by ADA-Texas and also describes the self-assessment undertaken by the TRC to determine how well it was itself complying with ADA provisions.

For the convenience of the reader, we have included a copy of the text of the law itself. We have also provided an index which thoroughly references both the course material and the text of the law.

For the visually impaired or for persons who like to learn by listening, we also have available a professional narration of the course material on three high-quality cassettes. Lessons have been edited—particularly Lesson 2—to accommodate the audio format.

Finally, with the approval of the President's Committee on Employment of People with Disabilities, we have reproduced several of their supplemental information sheets and included them as helpful additions to the course material.

DEC
September, 1992
New York

UNDERSTANDING THE

AMERICANS WITH DISABILITIES ACT

LESSON 1

INTRODUCTION and OVERVIEW

Ronald R. Schmidt, MS, CRC

Presented by Directions in Rehabilitation

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Key Points

- The ADA differs from the Rehabilitation Act of 1973 mainly in that it extends provisions from the Act to individuals in the *private sector.*

- Title I of the ADA prohibits employers from discriminating against people with disabilities who are qualified to do the *important aspects* of the job, and also mandates that *employers must accommodate the limitations* related to the disability or disabilities in question.

- Disabled employees are protected by the ADA if they are *qualified individuals with a disability* which impairs a major life activity, have a *record of disabilities*, or if they are *regarded as disabled* or perceived as having a disability. A qualified person is one who is capable of performing the *essential functions* of the job.

- The role of the rehabilitation professional will include: *soliciting the appropriate information from the medical community* to determine how the individual is functionally limited; helping determine if a disabled employee is a qualified individual; performing *job assessments* to determine the "essential functions" of the position; *gathering resource material* for employers and rehabilitation professionals; *suggesting reasonable accommodations* to overcome functional limitations; staying current with ADA case law as it develops; and helping *dispel private-sector ignorance* of and resistance to the ADA.

- Because the ADA has shifted emphasis from retraining the worker to *accommodating* the worker's limitations, both the private and public sectors of rehabilitation will come to *rely less on extensive retraining.*

- Job-seeking and job placement activities will be affected greatly by the Americans with Disabilities Act since *employers will have to change their application and interview procedures.* Rehabilitation professionals should *educate their clients* about this process so they can be prepared to stress their abilities to do the job, and can relate their answers to what they know to be the functions of the job.

Introduction

By the time the regulations in Title I of the Americans with Disabilities Act (ADA) took effect on July 26, 1992, there had already been volumes written, hours of seminars presented, and much discussion about the impact this law would have on Americans. There had been countless rumors about the intensity of enforcement and the trauma it would create in our economy. Some Better Business Bureaus issued alerts of "ADA- Certified" experts attempting to prey on the fears of businesses and corporations. It was rumored that large amounts of money had been designated for enforcement to the Equal Employment Opportunity Commission (EEOC) so that they could hire lawyers and job analysts for claim-investigation purposes. In *The Field Report*, Timothy Field notes that there had been speculation that the ADA would be effective to the point that it would replace rehabilitation in the Workers'Compensation systems of some states.[1] There had even been some speculation that this Act would "wipe out" many small and even medium-sized businesses because of expensive accommodations required for workers with disabilities and the high costs of remodeling to make existing structures accessible. The ADA was referred to humorously as "The Lawyer's Full Employment Act" due to the enormous amount of litigation which was anticipated. In short, there had been a considerable degree of fear, speculation, and even profiteering anticipating the impact of this law. The bottom line is that we will not know the full impact this legislation will have on Americans with disabilities and employers for a long time to come.

What we do know now are the rules and regulations contained in the text of the law and the interpretive guidance provided by the EEOC. This lesson will provide a brief overview of the law and then discuss some of its implications for professionals in the field of rehabilitation.

Historical Perspective

The Rehabilitation Act of 1973 contained three sections which provided for fair employment opportunities to people with disabilities. Section 501 required federal agencies to practice nondiscrimination toward the disabled; Section 503 was an "affirmative action" for the disabled worker; and Section 504 dealt with accessibility in the areas of transportation, housing, educational institutions, social service agencies, and prisons; it applied to any entity, public or private, receiving federal grants.

The federal civilian work force did not grow in the 1980s as expected due to pressures related to the federal deficit; this stymied the impact 501 might have had. Section 503's impact had been modest because many of the large companies that had federal contracts lost workers during the 1980s. The Reagan "New Federalism" movement limited the expected growth of federal grants; many private nonprofit organizations and grant-assisted entities found their federal grants cut or not increased, which limited new employment.[2] Therefore, a law conceived in one economic and political era, the liberal late '60s and early '70s, was implemented in a more politically conservative and leaner, down-scaling economy which negated many benefits this legislation may have conferred on America's disabled population.

Census bureau data reveal that the employment rate of disabled individuals actually declined in the 1980s.[3] In short, **Sections 501, 503, and 504 did not have the impact that they were intended to have**; this was noted by many individuals and organizations such as the National Council on Disability (NCD, formerly the National Council on the Handicapped). These groups and other concerned individuals observed that federal civil rights for people with disabilities applied only to "the public sector" (i.e., government agencies, federal grantees). Further, it was felt that while the Rehabilitation Act of 1973 was useful, it did not go far enough. As a result, **the ADA sought to extend civil rights to individuals in the private sector.**[4]

The Law

The Americans with Disabilities Act contains five sections which address employment, public services, public accommodations, telecommunication companies, and miscellaneous areas. Title III, Dealing with Public Accommodations, took effect in January of 1992 and is enforced by the Department of Justice. **Title I, Dealing with Employment, is enforced by the EEOC. On July 26, 1992, regulations related to Title I applied to companies with 25 or more employees. In 1994, companies with 15 to 24 employees will also be required to comply with Title I.**

Title I of the ADA prohibits employers from discriminating against people with disabilities who are qualified to do the important aspects of the job. Furthermore, it mandates that employers must accommodate the limitations related to the disability or disabilities in question. The rules and regulations to implement this law make it clear that employers, state and local governments, employment agencies, and labor unions cannot discriminate against qualified individuals with disabilities in personnel practices such as job application, hiring, firing, promotion, compensation, job training, and other terms, conditions, and privileges of employment.

There is no affirmative action in this law requiring employers to seek out people with disabilities as there is in Section 503 of the 1973 Rehabilitation Act. An article which appeared in the *Omaha World Herald* on July 5, 1992, quotes Liz Savage, National Training Director for the Disability Rights, Education, and Defense Fund, as stating that "the ADA is a civil rights statute, not an affirmative action statute. No quotas or goals are required....you are not required to alter qualifications. You can hire the most qualified individual."[5] Ms. Savage stressed that any firing decision must be based on some distinction other than a person's disability.

Disabled employees are protected by the ADA if they are qualified individuals with a disability which impairs a major life activity, have a record of disabilities, or are regarded as disabled or perceived as having a disability. Lesson 2 of this course provides a thorough explanation of these terms.

A qualified person is defined as one who possesses the requisite skill, experience, education, or other related requirements to enable that person to perform the essential functions of the job regardless of the consideration of the need to make accommodations. In other words, this means that **a qualified person is one who is capable of doing the important parts of the job.**

In the Rules and Regulations published by the EEOC, it is noteworthy that the Commission, when discussing reasonable accommodations, deleted the reference to "undue hardship" from the definition of reasonable accommodation. This is because they wanted to put distance between the requirement of employers to accommodate the limitations of a disabled individual and the defense of undue hardship afforded by this law. They noted that the change did not affect the obligation of employers or the rights of individuals with disabilities.

The EEOC has emphasized its desire to see the spirit of the ADA followed and went to great lengths to convey this in its Rules and Regulations. For example, it eliminates the term "handicap" from all legislative and professional jargon, replacing it with the term "disability." **Likewise, Title I of the ADA goes further than simply prohibiting discrimination; it obligates the employer to accommodate the disabled individual. The "spirit" of the law then is to encourage positive interaction between employers and disabled workers so that the latter segment of the population can lead truly independent lives.** It presupposes that **economic independence** is the key to achieving this goal. Nell C. Carney writes:

> "Laws are passed with the hope that the results will be more services— more opportunities— for people with disabilities. Policies are developed with the hope that implementation of the law will be simplified and compliance made easier. As we live with and work with our existing laws and public policies, a true evaluation of their value to our society will be whether they ultimately translate into more opportunities, greater independence and true integration of people with disabilities."[6]

Societal Attitudes

Whether employers will attempt to comply with this law and adhere to the policies set forth by the EEOC remains to be seen. How will the policies and the enforcement of the law shape employers' and society's attitudes toward individuals with disabilities?

Goffman observes in *Stigma: Notes on the Management of Spoiled Identity* that **individuals with disabilities are perceived as different, and therefore less competent**, than nondisabled individuals.[7] The authors of *Social Stigma: The Psychology of Marked Relationships* explain that certain characteristics that have no basis in fact are often attributed to individuals who deviate from the norm.[8] Workers with disabilities, for example, are perceived as less competent because they have physical or mental impairments that make them different from their peers.[9] **When personnel decisions are made**, the authors of *Social Stigma* argue, **these individuals are discriminated against because of their "perceived" incompetance.**[9] During times of economic downturn and layoffs, people with disabilities are let go first. This stigma of perceived incompetance helps to explain the discrimination that individuals with disabilities have experienced in hiring and promotion. In effect, the ADA furthers the aims of previous civil rights legislation. Employers must now disregard disability, as well as age, sex, race, and religion, during the application and hiring process.

ADA's Impact on the Role of the Rehabilitation Professional

At this point, the degree to which employers will comply with this new law, or the extent to which the EEOC will enforce its rules and regulations, is not known. We can speculate, with some degree of certainty, as to how **the role of the rehabilitation professional** might be affected. First, **many employers may need assistance in determining if a disabled employee is a qualified individual**. That is, the job candidate or disabled employee may have a physical or mental condition, but it may not hinder a major life activity. **The rehabilitationist's unique expertise in soliciting the appropriate information from the medical community to determine how the individual is functionally limited can be of great assistance to the employer in this respect.** Making the appropriate referral to a medical professional who can provide treatment and maximize the functional capacities of the worker may even eliminate the need for an accommodation. At the very least, the medical community is capable of delineating the functional limitations, thus making the task of accommodating the limitation more meaningful, appropriate, and manageable.

The rehabilitation professional will need to be familiar with Title I of the ADA and be knowledgeable about resource material available for employers and rehabilitation professionals, such as the *ADA Technical Assistance Manual.* This publication was produced by the EEOC to help employers implement Title I of the ADA. This manual includes free updates. Employers should also know about the 10 regional disability and business accommodation centers such as the Independent Living Research Utilization (ILRU) programs of the Institute of Rehabilitation and Research (IRR) in Houston, Texas, which provides information, training, and technical assistance to businesses. These centers all have 800 numbers.

Rehabilitation professionals should also encourage the companies they are consulting to obtain such resources for their own use; consultants can educate these companies on how to use these and other such resources. One approach that is effective without being intrusive is to regard the employer much the same as an injured client; i.e., **the rehabilitation professional should empower the employer to be as independent as possible.**

The rehabilitation professional must also endeavor to stay current with case law as complaints are adjudicated through the EEOC. Vigilantly following and keeping abreast of the case law as it develops will be critical as the boundaries and definitions of the rules and regulations are made through this legal process. On the other hand, rehabilitation professionals should guard against becoming "frustrated lawyers." They should take great care in how they represent themselves and their role, holding themselves to a high professional standard while simultaneously removing themselves from personal legal opinions.

Marjory L. Cockrell stresses that "an effective team approach is vitally important in successfully implementing the intent of the ADA."[10] She holds the "key players" to be the employer, the individual with a disability, the human resources director, the vocational rehabilitation professional, medical professional, industrial psychologist, attorney, manager and supervisor, coworkers, and the EEOC. As we explore some of the areas of the rehabilitation field, it will become apparent that rehabilitation practitioners will not see their role changing as much as they will do some of their tasks differently. There may be a different emphasis on some of their activities as well.

Areas of Impact on the Rehabilitation Field

Rehabilitation protocol has traditionally dictated that the first desired outcome for return to work is a return to the same employer—same job, if possible, with a modified version of a previous job being the second desired outcome. If the first desired outcome cannot be achieved, the second outcome must be attempted; that is, reasonable accommodations must be made. Rehabilitation protocol dictates that retraining is desirable only if the first two objectives are unable to be fulfilled. **Because the ADA has shifted emphasis to accommodating a person's limitations, both the private and public sectors of rehabilitation will come to rely less on extensive retraining.**

There has been much fear on the part of employers as to the expense the implementation of the ADA will place on the shoulders of business. There is good reason for this fear when one considers the potential consequence of a business' noncompliance. Benshoff and Souheaver cite Siska's suggestion that, "...the claim of undue hardship primarily applies to employers operating in the red or at the margin level in rural or depressed areas."[11]

Many of the fears employers express stem from a lack of information or misconceptions about the ADA. An owner of a construction firm expresses the opinion that the reasonable accommodation "stuff" fostered hardship to his company, "I mean, could you see me modifying a laborer's position so that a man in a wheelchair could perform his duties? You've got to be kidding, this can't possibly affect me!"[12] Alyssa Brazil notes that job developers approaching employers for job descriptions are being scrutinized to determine if they are "watch dogs for Uncle Sam" in disguise.

There are several points that rehabilitation professionals should stress to employers when discussing accommodations. First, **tax incentives are available**, as noted in the "President's Committee on Employment of People with Disabilities" literature.[13] Second, **accommodations are not necessarily expensive.** Deutsch and Sawyer credit Section 503 and 504 for teaching us that "making new buildings accessible adds only about one percent to the cost of construction, while retrofitting existing structures could be, and frequently was, far more expensive."[3] Mark Briskie gives five common types of job accommodations and includes work sites, work stations, work environment, job restructuring, and work activities modification.[14] Third, representatives from the EEOC and advocates for disabled individuals both stress that **the ADA does not mandate that employers hire less qualified individuals. Employers need to be assured also that the ADA does not obligate them to be mind readers: if a disabled individual conceals any physical or mental limitations, the employer is not required to solicit this information.** In fact, employers are not permitted to inquire about a person's disability during the application process under Title I of the ADA.

Workers' Compensation

In the workers' compensation arena, if employers are able to show an undue financial hardship, **it may be advantageous to the insurance company to pay for the reasonable accommodation rather than pay to retrain an individual for another occupation.** The rehabilitation consultant's job in these instances would be to assist the insurance company and the employer by making recommendations for the accommodation.

There is nothing in the ADA which prohibits employees from paying for their own accommodations. This, however, in no way eliminates or even diminishes the employer's obligation to accommodate the disabled individual's limitations. In fact, the employees may even withdraw their offer to provide their own accommodations without jeopardizing their rights under the ADA.

Some proposed workplace accommodations may necessitate a lengthy training period or create an undue hardship. It may be in the best interest of employers and insurance companies to go to the workers' compensation court and explain the situation.

Job-Seeking and Placement

Job-seeking and job placement activities will be affected greatly by the Americans with Disabilities Act since **employers will have to change their application and interview procedures. The ADA requires job applications to be free of questions about disabilities, injuries, illness, and workers' compensation claims.** Employers may not ask about any of these areas in interviews. When instructing clients in job-seeking techniques and interviewing skill techniques,

rehabilitationists should educate their clients about what the employer can and cannot ask. Clients can then be prepared to stress their abilities to do the job and relate their answers to what they know to be the functions of the job.

The rehabilitation professional can assist employers by using effective analysis methodologies. It is beneficial for employers to provide job descriptions that delineate the essential functions of the position. This is an excellent opportunity for the rehabilitation professional to point out that the ADA gives the employer the right to identify essential job functions. Job descriptions should be preceeded by a job analysis, since the job description summarizes the job analysis. The job analysis should be formatted by the Dictionary of Occupational Titles, and the duties should be classified as "marginal" or "essential."

Diminution of earnings or loss of earning capacity studies may be affected by the ADA. Pre-ADA, it was assumed that employers would not accommodate an impaired individual's limitations, and a loss of access to the labor market would result. This, along with a loss of wages, loss of stability of employment, and loss of ability to do the job were all factors that reduced an individual's earning capacity caused by an injury. **Post-ADA, since employers must accommodate limitations, there should be more jobs that a person can do where they can make as much if not more money than they did pre-injury.** Thus, they should not, theoretically, suffer as great a loss of earning capacity because of the employer's obligation to make accommodations. It should be stressed that this will of course depend on the actual impact the ADA has on employers' attitudes. Of course, the degree of enforcement will undoubtedly shape the employer's attitude significantly.

Summary

Rehabilitation professionals will have to sharpen some old skills and acquire some new ones in meeting the challenges and opportunities presented by the ADA. The overall effect will undoubtedly be a positive one for disabled Americans. The Equal Employment Opportunity Commission estimates that 63,000 disabled Americans will find jobs in the next year because of this legislation. **Rehabilitation professionals should stay within their expertise and be open to being part of a multidisciplinary approach to helping disabled individuals integrate and reintegrate into the world of work. Their role should be that of an educator, consultant, and care provider. They should stress to employers what they can do for the company,** and emphasize that **the ADA may well be a solution to the skilled-worker shortage that exists currently and is increasing.**

Rehabilitation professionals can assist in writing job descriptions and making recommendations about accommodations. They can help reduce stereotypes and negative attitudes toward people with disabilities. The rehabilitation practitioner can also help companies overcome their fear of the ADA. They can demonstrate that most accommodations do not have to be expensive. They also can assure them that this law says that they still can hire anyone they want, as long as they have equal skills and their hiring decision is not based on fear or out of consideration of expense.

The rehabilitation professional can **provide disability management** to correct, circumvent, or compensate for limitations that are presented by various mental and physical impairments.

Finally, the rehabilitation professional can also provide information to the courts to help them base

their decisions on facts rather than supposition. They can advocate for their clients and educate them about their rights so that they can advocate for themselves.

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QUESTIONS BASED ON THIS LESSON

1. Which of the following statements is *false*?
   - A. The Rehabilitation Act of 1973 requires federal agencies to provide fair employment opportunities for disabled people
   - B. The Rehabilitation Act of 1973 limits coverage to individuals in the public sector, whereas the ADA includes coverage of individuals in the private sector
   - C. The ADA includes an "affirmative action" statute, similar to that in Section 503 of the Rehabilitation Act of 1973
   - D. During the 1980s the employment rate of disabled individuals declined

2. When implementing the ADA, the rehabilitation professional should:
   - A. avoid referring clients to medical professionals for physical or mental health evaluations
   - B. make the employer determine the "essential functions" of a job
   - C. establish a partnership relationship with the employer
   - D. keep the private sector ignorant of the specific provisions of the ADA

3. The ADA:
   - A. will require expensive accommodations on the part of all small businesses
   - B. mandates that employers accommodate all concealed or revealed disabilities
   - C. requires job applications to be free of questions about disabilities, injuries, illness and workers' compensation claims
   - D. prohibits employees from paying for their own accommodations

4. The author expects that the ADA:
   - A. will affect earning capacity negatively
   - B. will not significantly change job placement
   - C. will limit the number of jobs disabled workers can perform
   - D. will shift the emphasis from retraining to accommodation

UNDERSTANDING THE

AMERICANS WITH DISABILITIES ACT

LESSON 2

THE LAW of the ADA: TERMINOLOGY and REGULATIONS

Jill Adams, JD

Presented by Directions in Rehabilitation

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Key Points

- The ADA prohibits employment discrimination by a covered entity against a qualified individual with a disability.

- *Disability* :

  a physical or mental impairment that *substantially limits* one or more of the *major life activities* of [an] individual; a *record* of such an impairment; or *being regarded* as having such an impairment.

- *Major life activity* :

  activity which the average person can perform without difficulty, including, but not limited to, caring for oneself, walking, seeing, hearing, speaking, breathing, learning, and working

- *Covered entity* :

  an employer, employment agency, labor organization, or joint management committee. As of July 26, 1992, the ADA covers employers with 25 or more employees. Employers with 15–24 employees will become subject to the ADA on July 26, 1994.

- *Qualified individual with a disability* :

  an individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires

- *Reasonable accommodation* :

  accommodations to the job environment the employer is *obligated* to provide to an otherwise qualified individual with a disability unless the proposed accommodation would constitute an *undue hardship* or *pose a threat to safety.*

- *Undue hardship* :

  an action requiring *significant difficulty or expense* when considering: 1) the nature and cost of the needed accommodation; 2) the overall financial resources of the facility providing the accommodation; 3) the overall financial resources and size of the covered entity; 4) the type of operations of the covered entity.

PART 1: EMPLOYMENT REGULATIONS

Introduction

The Americans with Disabilities Act (ADA)[1] is, in the words of the Act itself, "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] It consists of a short introductory section and five separate titles which contain the substantive provisions of the Act. The introductory section contains the title of the act, congressional findings and definitions used throughout the Act. **Title I addresses employment discrimination; Title II addresses discrimination in the public sector, including public transportation; Title III addresses discrimination in public accommodations operated by private entities; Title IV incorporates certain requirements for telecommunications** relay services for hearing and speech-impaired individuals; and **Title V contains a number of miscellaneous provisions**. The Act is complex, and its full implications will be worked out in the courts. This lesson is designed to give an overview of the Act by focusing on the key terminology used in the ADA, with **emphasis on Title I on employment and Title III on public accommodation**. Many of the examples provided in the discussion which follows are derived from Interpretive Guidances issued by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice. These agencies have frequently derived these examples from case law under the Rehabilitation Act of 1973 and the legislative history of the ADA, which itself borrows extensively from case law under the Rehabilitation Act.

Who Is Protected by the ADA?

THE DEFINITION OF "DISABILITY":

The ADA protects persons with disabilities and, in certain circumstances, persons associated with persons with disabilities.[3] The definition of "disability," found in the introductory section of the Act, is applicable to all titles of the ADA. "**Disability**" has a three-pronged definition:

a) **a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual**;

b) **a record of such an impairment**; or

c) **being regarded as having such an impairment.**[4]

Thus, the ADA extends not only to those who are currently suffering from an impairment but also to those who have previously suffered from an impairment or who, although not actually impaired, are viewed by others as having an impairment affecting a major life activity. This definition of "disability" is, in all significant respects, the **same as the definition of "handicap"** contained in the Rehabilitation Act of 1973, as amended in 1974.[5]

Impairments that Substantially Limit Major Life Activities

In order to fall within the first prong of the definition one must 1) have a mental or physical impairment and 2) that impairment must substantially limit one or more major life activities. The Act itself does not provide further insight into the meaning of "impairment," "substantially limits," or "major life activities."

Different administrative agencies have been given the task of promulgating regulations under the different titles of the Act. **The EEOC has issued regulations for implementing Title I, relating to employment**; the Justice Department has issued regulations implementing Title II and Title III, exclusive of those provisions affecting transportation systems. Regulations implementing the portions of Title II and Title III that address transportation have been issued by the Department of Transportation.[6] The EEOC regulations define all three terms; the Department of Justice regulations define "impairment" and "major life activities." The Department of Transportation regulations closely track those issued by the Department of Justice.[7]

IMPAIRMENT:

Both the EEOC and the Department of Justice have defined "**physical or mental impairment**" as:

1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, genito-urinary, hemic and lymphatic, skin, and endocrine; or
2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[8]

This definition is substantially the same as the definition of "impairment" contained in the regulations implementing the Rehabilitation Act of 1973.[9] The regulations under that Act contained a non-exhaustive list of representative diseases and conditions that would constitute an impairment. The Department of Justice, but not the EEOC, has adopted a similar approach with respect to the regulations implementing the public sector and public accommodation portions of the ADA. These regulations state:

> The phrase physical or mental impairment includes, but is not limited to, such contagious and non-contagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.[10]

Thus, **the term "impairment" is broad, encompassing both conditions and diseases**. Of particular note is the inclusion of **HIV disease, whether symptomatic or asymptomatic**.

A number of conditions are **expressly excluded from the definition of "disability" by statute**, although some (but not all) may be viewed as impairments. These include: **homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not stemming from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance abuse disorders resulting from current illegal use of drugs.**[11]

Even though the representative list of impairments listed by the Justice Department includes drug addiction, the ADA expressly provides that "the term 'individual with a disability' **does not include an individual who is currently engaging in the illegal use of drugs** when the covered entity acts on the basis of such use." The regulations and the Act are consistent. The ADA retains protection for individuals who have recovered from drug addiction. **One who has been addicted to drugs in the past or who is in a drug treatment program and no longer using drugs is included within the definition of "disability"** under the second and third prongs of the definition of "disability," but **a current user is not protected under any prong of the definition**. Even with respect to a past user of drugs, the EEOC's Interpretive

Guidance provides, "an employer, such as a law enforcement agency, may...be able to impose a qualification standard that excludes individuals with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity.[12]

Only impairments which substantially limit a major life activity constitute a disability under the first prong of the definition of disability. The Interpretive Guidances issued by the EEOC and the Department of Justice emphasize that physical characteristics, such as eye color, left handedness, or weight and muscle tone which is within a normal range, do not constitute an impairment. Similarly, **personality traits such as poor judgment or a quick temper are not covered, nor are environmental, cultural or economic disadvantages.**[13] An attribute constituting an impairment, however, remains classified as an impairment even if it can be completely controlled through medication or corrected through a device such as a hearing aid.[14]

MAJOR LIFE ACTIVITY:

To constitute a disability under the first prong of the definition of "disability," it is not enough that an impairment be identified. The impairment must substantially limit a major life activity. **Major life activities are those activities which the average person can perform without difficulty.**[15] The regulations promulgated under the ADA list as examples of major life activities "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[16] This list is not exhaustive; such activities as sitting, standing, lifting, and reaching are also covered.[17]

SUBSTANTIALLY LIMITS:

In some instances, it is evident that a condition substantially limits a major life activity. A paraplegic is substantially limited in the major life activity of walking; one who is blind is substantially limited in the major life activity of seeing. **One is substantially limited in a major activity if one cannot perform a major life activity that an average person can perform or if one is significantly limited as to the manner, duration, or conditions under which the activity can be performed.**[18]

In determining whether there is a substantial limitation, the **duration** of the impairment, its **nature and severity,** and the **long term impact** of the impairment are considered.[19] A broken leg, a case of appendicitis, or the flu does not substantially limit a major life activity. On the other hand, if an individual can function fully only with the aid of medication or special devices, that person is limited by the conditions under which the activity can be performed and therefore meets the definition of disability under the first prong of the definition. For example, one whose hearing can be corrected with a hearing aid or whose diabetes can be controlled through insulin injections would have disabilities under the first prong of the definition of disability.[20] The EEOC's Interpretive Guidance provides that some impairments, "such as HIV infection, are inherently substantially limiting."[21]

The greatest difficulty the courts have faced under the analogous definition of "handicap" in the Rehabilitation Act of 1973 is determining when the major life activity of working is substantially limited. **If one is restricted from only one job with one employer, one is not substantially limited in the major life activity of working. On the other hand, the fact that one may be able to perform some work does not preclude one from falling within the definition of "disability" in the ADA.**

The regulations issued by the EEOC address the issue directly, providing that "with respect to the major life activity of 'working,' the term 'substantially limits' means **significantly restricted in the ability to perform either a class of jobs or, a broad range of jobs** in various classes, as compared with the average person having comparable training, skills and abilities."[22] The fact that one may not be able to perform a specific job is insufficient to constitute a substantial limitation. In analyzing whether one is substantially limited in the ability to work, one may consider the **geographical area** to which the individual has access and the **number of jobs within that geographical area** from which the individual is disqualified because of his or her impairment.[23]

A number of examples are given in the EEOC's Interpretive Guidance. If an individual has the training, skill and ability to be a pilot but does not qualify as a commercial airline pilot because of a minor vision impairment, that individual is not considered substantially limited in the major life activity of working if he or she is able to be a pilot for a courier service. Similarly, if a major league pitcher can no longer pitch because of an injury to his elbow, he would not be substantially limited in the major life activity of working because he would be disqualified only from a specialized or narrow range of jobs. On the other hand, if a back injury prevented someone from doing any heavy labor job, that person would be substantially limited in the major life activity of working because a whole class of jobs would be foreclosed. Similarly, a whole range of jobs in various classes would be foreclosed to one who had an allergy to a substance found in most high-rise office buildings. Thus, such an individual would be substantially limited in the major life activity of working.[24]

The Second Test for Disability: "To have a record of such an impairment"

Under the second test for disability **it is sufficient that an individual have a record of an impairment even if that impairment does not currently substantially limit a major life activity of the individual**. The definition covers both those who have a history of an impairment which substantially limits major life activities and those who have been misclassified as having such an impairment.[25]

This prong of the definition of "disability," like the third prong, is designed to eradicate discrimination based on the stigma associated with disability. The legislative history of the ADA cites the person with a history of mental illness as the paradigm of an individual who would be covered under the second prong of the definition of "disability."[26] Other examples include persons who have had cancer or heart disease or who have been misdiagnosed as having mental retardation or mental illness.[27]

The Third Test for Disability: "Is regarded as having such an impairment"

The final prong of the definition of "disability" applies to those individuals who are regarded by others as having a disability even though they do not have an impairment that substantially affects a major life activity. One may fall under this prong of the definition of "disability" in three possible ways.

First, **one may have an impairment which is not substantially limiting, but which is perceived by others as limiting**. For example, if an individual has controlled high blood pressure, there may in fact be no limitation on the individual's ability to function. Nevertheless, if an employer assigned that individual to lighter tasks because of the employer's unfounded fear that the individual was likely to suffer a heart attack, the individual would be encompassed under the third prong of the definition of "disability" because a nonlimiting impairment was perceived by others as being limiting.

Second, one may have an impairment that imposes no limitations on the individual other than those which result from the attitudes of others. For example, a prominent facial disfigurement or birthmark may not limit an individual at all. Nevertheless, if others react to that individual negatively such that an employer would not want to hire such an individual or a public accommodation would not want to serve such an individual for fear of customer reaction, then that individual would fall within the third prong of the definition of "disability."

Finally, **one may have no impairment at all but may be falsely viewed by others as having an impairment**. Thus, if one is rumored to be infected with HIV and others treat one as so infected, even though the rumors are false, one falls within this third prong of the definition of disability.[28]

The rationale behind the second and third prongs of the definition of "disability" was explained by the Supreme Court in *School Board of Nassau Co. v. Arline*.[29] In *Arline*, the Court considered the applicability of the Rehabilitation Act of 1973 to an individual diagnosed with tuberculosis. In holding the individual covered, the Court stated that in providing coverage for those who were regarded as having a disability as well as those who actually had a disability, "Congress acknowledged that society's accumulated **myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment**."[30]

Title I: Employment

Title I of the ADA contains a broad prohibition of employment discrimination by covered entities against qualified individuals with disabilities. Employment discrimination includes discrimination in **job application procedures, hiring, advancement, discharge from employment, employee compensation, job training and any other term or condition of employment**.[31] The ADA, however, **does not require quotas or affirmative action** in the hiring of persons with disabilities. In order to understand the employment provisions of the ADA, it is necessary to understand the meaning of key terms, such as: "**covered entity**," "**qualified individual with a disability**," "**reasonable accommodation**,"and "**undue hardship**," as well as terms used in defining these terms, such as "**essential job function**."

"COVERED ENTITY":

The ADA parallels the Rehabilitation Act of 1973 in many ways. Perhaps the most significant departure from the Rehabilitation Act is its scope. The Rehabilitation Act prohibits discrimination on the basis of disability by federal agencies, federal contractors, and recipients of federal financial assistance. [32] The ADA, on the other hand, reaches **private as well as public entities**, prohibiting discrimination by "covered entities."

The ADA defines "**covered entity**" as an "**employer, employment agency, labor organization, or joint labor-management committee**."[33] These terms have essentially the same meanings as they have under Title VII of the Civil Rights Act of 1964. The only significant difference is that Title VII covers employers who have 15 or more employees, whereas the **ADA presently only covers employers with 25 or more employees. Employers with fifteen to twenty-four employees will become subject to the ADA on July 26, 1994.**[34] **The federal government, Indian tribes, corporations wholly owned by the federal government, and bona fide private membership clubs that are tax exempt** under section 501(c) of the Internal Revenue Code (other than labor organizations) **are exempted from coverage**.[35]

State and local governments are covered under the Act. **Even if a nonfederal governmental unit does not meet the requisite number of employees to be a "covered entity" under Title I, it will be subject to Title II of the ADA.**

"QUALIFIED INDIVIDUAL WITH A DISABILITY":

Title I of the ADA prohibits employment discrimination by a covered entity against a "qualified individual with a disability." The term **"qualified individual with a disability"** is defined in the Act as "an individual with a disability who, **with or without reasonable accommodation, can perform the essential functions** of the employment position that such individual holds or desires."[36] According to the legislative history of the ADA, the "definition [of 'qualified individual with a disability'] is comparable to the definition [of 'otherwise qualified individual with a handicap'] used in regulations implementing sections 501 and 504 of the Rehabilitation Act of 1973."[37]

In determining whether a person with a disability is qualified, the **first step is to determine whether the individual has the requisite skills, training, licensing, experience**, etc., for the position, just as one would with any applicant. The next step is to determine **whether the individual can perform the essential functions of the position, with or without accommodation.**[38]

If an individual can perform all of the requirements of a job despite his or her disability, then it would be a clear violation of Title I to refuse to hire the individual because of the disability. For example, if an individual with medically controlled epilepsy applied for a job as a cashier, no accommodation would be necessary. A refusal to hire the individual because of his or her epilepsy would violate Title I.

If the individual is not able to perform all the requirements of the position, two further questions must be answered. It is first necessary to ascertain whether the individual could perform all of the requirements of the job **if some accommodation were to be made** for the person's disability. For example, if a paraplegic applied for a position of cashier but could not perform the job because the cash register was too high to be reached from a wheelchair, a reasonable accommodation would be to lower the cash register. Thus, even though some adjustment would have to be made because of the applicant's disability, the applicant would still be a "qualified individual." It would constitute illegal discrimination to refuse to hire the individual unless it would constitute an undue hardship on the employer to lower the cash register.

If the individual is not able to perform all of the requirements of a job even with accommodation, that does not end the inquiry. **The individual will still be qualified if the requirements that the individual cannot meet relate to marginal rather than essential elements of the job.** For example, if there are two equally qualified applicants for a position as a telephone surveyor, one of whom is blind and the other of whom is not, the employer may not discriminate against the blind person even if the employer believes it would be convenient, but not essential, to hire someone with a driver's license so that the employee can occasionally run errands.[39]

The determination of whether an individual is qualified is to be made at the time of the employment decision. The individual's abilities at that time are to be considered, **without speculation about possible future deterioration of abilities** or of effects on health insurance premiums or workers' compensation costs.[40]

"ESSENTIAL JOB FUNCTIONS":

Sorting out essential from marginal functions of a job is a difficult task and is likely to be a focus of litigation under the ADA as it has been under the Rehabilitation Act of 1973. The ADA provides, "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a **written description before advertising or interviewing** applicants for the job, this description shall be considered **evidence of the essential functions of the job.**"[41] In addition to considering written job descriptions and the employer's judgment, the EEOC and the courts are to consider the following in determining whether a job function is essential: 1) The **amount of time** spent on the job performing the function, 2) the **consequences of not having the incumbent perform the function**, 3) the terms of a **collective bargaining agreement**, 4) the work **experience of past incumbents** on the job, and 5) the work **experience of current incumbents** in similar jobs.[42]

For example, one of the first issues is to **determine whether the employer actually requires employees in the position to perform the function that is asserted to be essential**. If the employer states that typing skills are required of an applicant for the position of receptionist, but a review of the functions of current or past employees holding that position indicates that these employees have not been required to type, then typing will not be deemed to be an essential function.

Similarly, the consequences of not requiring the incumbent to perform the function must be considered. It may be that a firefighter will not have to carry an unconscious person out of a fire very often. Nevertheless, the consequences of not being able to perform this feat could be grave. Thus, the ability to lift a certain amount of weight may be essential to a firefighting position.[43]

Other consequences may be determined by the **amount of time the incumbent will be expected to perform the function and the number of other employees among whom the performance of the function may be distributed**. For example, in a case decided under an analogous state law, an employee brought suit against her employer alleging she was illegally discharged because of her disability—an asthmatic condition which required her to avoid dust and heavy exercise. The court found that because only 12% of her time involved exposure to dust and heavy exercise and because there were other employees who were available for reassignment to these duties, performance of these duties did not constitute an essential job function.[44] In contrast, the fact that few employees are available for reassignment may make a function essential even though it engages only a small portion of an employee's time.[45]

In determining whether a job function is essential, one must **focus on the end result rather than the means** of achieving the result. For example, if an employer specifies that an employee must be able to carry a heavy load a short distance, the requirement of "carrying" would be nonessential if the employee could transport the load the requisite distance by using a dolly. Similarly, if use of a computer is required for a job, it may be essential to be able to access, input, and retrieve information from the computer, but keyboarding would not be essential if someone without the manual dexterity to keyboard could access, input, and retrieve information from the computer by using adaptive software or hardware.[46]

"REASONABLE ACCOMMODATION":

Unlike most civil rights legislation, the ADA is not limited to requiring neutrality towards the protected class in employment decision-making. Although there is no requirement to favor individuals with disabilities in the employment setting, there is a requirement that an employer or other covered entity provide reasonable accommodation of the known mental or physical limitations of an otherwise qualified individual with a disability.[47] An employer may, however, raise as a **defense** to this requirement the **claim that the accommodation would constitute an undue hardship**[48] **or pose a threat to safety**.[49]

Proposed amendments to the ADA would have placed an economic cap on the expenditure required of an employer in making a reasonable accommodation at 10% of an employee's salary.[50] This approach was rejected in Congress, which instead chose to define "reasonable accommodation" by setting forth a non-exclusive list of accommodations which may be required. The legislative history makes clear that the reasonable accommodation requirement is meant to impose a significant as opposed to a *de minimis* obligation on employers.[51] The list of possible accommodations provided by Congress includes:

1) making existing facilities readily accessible and usable by individuals with disabilities;
2) job restructuring (which may include the reassignment of marginal functions of the position or rescheduling when certain job functions are performed);
3) part-time or modified work schedules;
4) reassignment to a vacant position;
5) acquisition or modification of equipment or devices;
6) appropriate adjustment or modifications of exams, training materials or policies;
7) the provision of qualified readers or interpreters.[52]

The EEOC's Interpretive Guidance lists as additional possible accommodations: permitting the use of accrued paid leave; providing additional unpaid leave for necessary treatment; making employer-provided transportation accessible; providing reserved parking spaces; providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide for a blind employee on occasional business trips.[53] **The determination of what constitutes a reasonable accommodation in a specific setting is to be decided on an individual, case-by-case basis.**[54]

The accommodations required are those that enable the individual to perform the essential functions of his or her job. **The employer is not required to provide an accommodation**, such as eye glasses, a prosthetic limb, or a seeing-eye dog, which would assist the individual in his or her daily activities **unrelated to the job even if the assistance would also be used on the job.**[55]

An employer is not required to provide accommodations for disabilities of which it is not aware. Usually the individual with the disability must inform the employer that accommodation is needed. Once the employer becomes aware of the need for accommodation, he or she must attempt to determine what accommodation is appropriate. This is to be done in consultation with the individual with a disability. While the preference of the person to be accommodated is to be considered, it is not determinative. **The employer may choose between effective accommodations**, taking into consideration cost and the ease with which the accommodation may be provided.[56]

"UNDUE HARDSHIP":

Intricately bound with the concept of reasonable accommodation is the concept of "**undue hardship**." An accommodation need not be provided if its provision would impose an undue hardhip on the employer. The ADA defines "undue hardship" as "**an action requiring significant difficulty or expense**," when considered in light of the following factors:

1) the **nature and cost** of the needed accommodation;

2) the **overall financial resources of the facility providing the accommodation**, the number of employees of such facility, and the effect on resources, expenses or other matters on the operation of the facility;
3) the **overall financial resources and size** (including the number of employees, and the number, type and location of its facilities) of the **covered entity**;
4) **the type of operation or operations of the covered entity**, including composition, structure and functions of the workforce, and the relationship of the facility to the covered entity (including geographic separateness and administrative and fiscal independence).[57]

In other words, what may be a reasonable accommodation for General Motors may impose an undue hardship on a small corner grocery.

The fact that an accommodation is costly does not necessarily indicate that it imposes an undue hardship. The resources of the employer must be considered. For example, in one case decided under the Rehabilitation Act of 1973, blind workers requested accommodations which included, among other things, readers, braille forms, and computers that stored and retrieved information in braille. The costs were substantial. Nevertheless, because the employer had a $300,000,000 budget, the court determined these accommodations did not impose an undue hardship.[58]

In determining whether an accommodation is an undue hardship because it is too costly, the analysis focuses on **net cost. Federal, state, and local tax deductions or credits and the availability of funding from external sources must be considered**. If proposed accommodations are still so costly as to constitute an undue hardship after these factors are considered, **disabled individuals must be given the option of providing the accommodation themselves** or of paying that portion of the cost of the accommodation which constitutes an undue hardship.[59]

Cost is not the only factor to consider in determining whether an accommodation is an undue hardship. **If an accommodation significantly disrupts the business, it may impose an undue hardship**. The Interpretive Guidance gives the example of a job applicant with a visual impairment. If this individual applies for a job as a waiter at a dimly lit nightclub where the lighting will make it difficult for the individual to see, an inexpensive accommodation which would be to turn up the lights. Nevertheless, this accommodation would impose an undue hardship because it would destroy the ambience of the nightclub. An employer is not required to provide accommodations that are disruptive or that fundamentally alter the nature or operation of the business.[60]

Illegal Employment Discrimination

Most of the literature on employment discrimination under the ADA has focused on the issue of reasonable accommodation. Other acts also may constitute illegal employment discrimination against persons with disabilities. Several of these are listed in the statute, but are not intended to be an exclusive list of prohibited discrimination.[61]

IMPERMISSIBLE LIMITING, SEGREGATING, AND CLASSIFYING:

A covered entity **may not limit, segregate, or classify a job applicant or employee** on the basis of the applicant's or employee's disability if it will have an adverse effect on the applicant or employee.[62] The goal of this provision is to integrate individuals with disabilities into the workforce fully. It would **violate this provision of the Act to assign individuals with disabili-**

ties to a particular facility of the operation. Similarly, it would be a **violation to segregate nonwork space such as lunch or break rooms**.[63]

The Interpretive Guide discusses the issue of insurance at length in its commentary on the prohibition against adverse limitation, segregation, or classification. An employer may not exclude individuals with disabilities from health insurance provided to other employees. **It is not a violation, however, to provide insurance which contains pre-existing condition clauses, so long as these clauses apply equally to all employees**. Similarly, an employer-provided policy could limit the number of procedures allowed in a given year. For example, a policy could limit coverage of blood transfusions to five a year. Even though this would affect a hemophiliac adversely, it would be allowed so long as all employee policies contained the limitation.[64]

IMPACT ON CONTRACTING SERVICES:

The ADA defines **impermissible discrimination** as **including participation in contractual arrangements or other relationships that have the effect of subjecting an employee or applicant to prohibited discrimination**.[65] An employer must be vigilant that **services provided by contract** do not discriminate against employees or applicants. For example, an employer that used a referral agency or a union hiring hall to obtain applicants would be liable for the discrimination of that agency or hiring hall towards the applicants, even though there was no intentional discrimination on the part of the employer. Similarly, if an employer contracts with an outside company to provide training for employees, the employer remains responsible as though it were providing the training directly. Thus, if the contracting company schedules the training in a location which is not accessible to employees who use wheelchairs, the employer must make an accommodation for those employees unless it would cause an undue hardship. Such an accommodation might include having the company providing the training reschedule the training to an accessible place, using another company with accessible locations, or making the scheduled location accessible.[66]

STANDARDS, CRITERIA, AND METHODS OF ADMINISTRATION:

It is impermissible "for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity [which] have the effect of discriminating on the basis of disability or . . . perpetuate the discrimination of others who are subject to common administrative control."[67] This provision incorporates a disparate impact standard into the ADA. **An action may be unlawful even if there is no discriminatory intent on the part of the covered entity**.[68] This area is one that is less well defined than some of the other areas of the Act. The EEOC has not elucidated this provision with an interpretive guidance, and the regulation only restates the statute.

DISCRIMINATION BY ASSOCIATION:

The ADA provides **limited protection to people who are in a relationship with an individual with a disability**. It constitutes unlawful discrimination to exclude or otherwise deny equal jobs or benefits to an individual because of that individual's relationship to an individual with a disability.[69] Under this provision it would be unlawful to refuse to hire someone because the applicant lived with an individual with AIDS or did volunteer work with AIDS patients. Similarly, one could not discriminate against an applicant or employee because of a fear that the need to care for a person with disabilities would cause excessive absenteeism or a fear that health insurance rates would increase because of dependent coverage for the person with a disability. On the other hand, there is **no requirement that reasonable accommodation be made for individuals related to or associated with persons with disabilities**. There is no requirement, for example, to provide a modified work schedule for such an individual.[70]

SELECTION CRITERIA:

The ADA prohibits using selection criteria that are unrelated to the position in question and that are not consistent with business necessity.[71] Consistent with this is a separate requirement that **tests concerning employment be administered in such a manner that individuals with sensory, manual, or speaking impairments are tested on the relevant job skills or aptitudes rather than on the impaired skills** (unless those skills are the relevant skills being tested).[72] Under these provisions, **any screening test or criteria used by an employer** or other covered entity **must be related to an essential function of the job**. Even if the criteria are related to an essential function, these screening criteria may not be used to exclude an individual with a disability who could perform the essential functions with reasonable accommodation. Production standards, however, are not generally subject to challenge under these provisions.[73]

If an individual has an impairment that may interfere with test-taking but would not interfere with performance of the job for which the test is a screen, the test must be administered in such a way as to **test the job-related skills and not the impairment**. In other words, reasonable accommodation must be provided in the test-taking setting. This requirement applies only where the covered entity has reason to know that the individual has impaired sensory, manual, or speaking skills.

For example, if an individual who is dyslexic applies for a job as a heavy equipment operator and has the abilities to perform the essential functions of the job, he or she may not be excluded from employment because of an inability to pass a written test. If reading is not an essential function of the job, the employer must find an alternative test of skills or an alternative means of administering the test once it becomes aware of the applicant's dyslexia.[74]

MEDICAL INQUIRIES AND EXAMS:

One area in which the ADA may significantly change employment practices is pre-employment medical exams and inquiries. Prior to making an offer of employment, an **employer may not inquire whether an individual has a disability**. In addition, **an employer may not ask about an applicant's workers' compensation history or require an applicant to undergo a medical examination. Inquiries are limited to whether the applicant can perform the functions** (both essential and marginal) of the position. If an individual with a disability can perform essential but not marginal functions, however, that individual may not be denied the position on the basis of his or her inability to perform the marginal functions. Included within the permissible range of questions are questions about whether the applicant will be able to adhere to the employer's attendance policy. It is also unlawful to require a medical exam or make inquiries about disabilities of an existing employee unless such exams are job-related and consistent with business necessity. For example, an employer could not require an employee to undergo HIV testing simply because the individual began to use increased amounts of sick leave.[75]

This prohibition does not preclude asking an individual about accommodations which may be needed to allow the individual to perform essential job functions or **requiring a demonstration of the applicant's ability to perform the function** if it appears the disability may interfere with the ability to do the job. The EEOC's Interpretive Guidance gives as an example an applicant, who has an amputated leg, applying for the position of washing machine repairman with. The employer could ask the applicant to demonstrate or explain how he would be able to transport himself and his tools down basement stairs. The employer could not, however, ask an applicant with a similar disability to demonstrate how he could sit at a table and assemble small parts unless such demonstrations were required of all applicants for the position.[76]

An application form may not require an applicant to list impairments. However, where a test is being administered related to employment, **the employer may ask whether accommodations will need to be provided in the administering of the test.**

Tests of physical agility may be given at any point in the application process, but **if they tend to screen out individuals with disabilities, they must be shown to be job-related and consistent with business necessity.** Such tests may not be selectively given but **must be given to all applicants for the position.**[77]

Post-offer medical exams may be required and the offer of employment may be conditioned on these exams if all persons hired for the position are required to undergo such exams. While the post-offer examinations need not be limited to conditions which are job-related and consistent with business necessity, any withdrawal of an offer based on an examination must either not screen out persons with disabilities or the criteria must be job-related and consistent with business necessity.[78] For example, psychological tests will probably be determined to be the kind of examination which can be administered only in a post-offer setting.[79] If such a test shows an individual has poor judgment and poor impulse control, it may be appropriate to withdraw an offer to serve as a police officer or prison guard. The withdrawal could be premised on the claim that the test did not screen out individuals with disabilities. Such psychological characteristics have been deemed not to constitute a disability under the analogous Rehabilitation Act of 1973.[80] Alternatively, the employer could claim that good judgment and impulse control are job related and consistent with business necessity.

The information obtained as part of a post-offer medical exam must be treated as confidential. The ADA and the EEOC's regulations define the narrow range of circumstances in which this information may be disseminated.[81]

Employers may administer voluntary medical tests as part of an employee health program.[82] In addition, the ADA provides that **drug testing does not constitute a medical examination.**[83] The act is neutral on the issue of drug testing, neither authorizing nor prohibiting it.

RETALIATION AND COERCION:

It is impermissible to discriminate against an individual because that individual has made a charge under the ADA or has assisted another in making such a claim or participated in an investigation of a charge. It is also impermissible to coerce or intimidate anyone because that individual has exercised his or her rights under the ADA or has assisted another in exercising their rights under the Act.[84]

Defenses

In addition to the defense that an accommodation may pose an undue hardship, **a covered entity may raise as a defense** to a disparate impact claim (i.e., a claim that qualification standards, tests, or selection procedures tend to screen out individuals with disabilities) **the claim that the standard, test, or selection procedure is job-**

related and consistent with business necessity and that the required performance cannot be obtained through reasonable accommodation.[85] For example, a requirement that an employee have a driver's license would tend to screen out blind persons. If the essential functions of a job do not require driving, but the employer believes it to be convenient to hire an individual who can drive because the individual may be able to run errands or because the employer believes that someone who drives is more likely to be at work on time, the requirement of a driver's license would not be job-related and consistent with business necessity. On the other hand, if the essential function of the job includes making floral deliveries, the requirement of a driver's license would be job-related and consistent with business necessity.

An employer may require that an individual not present a direct threat to the health or safety of others in the workplace.[86] EEOC regulations on this issue provide that it is **also legitimate to exclude one from employment because of a direct threat to that individual's own health or safety.**[87] The regulation's departure from statutory language is consistent with case law under the Rehabilitation Act[88] and the legislative history of the ADA[89] but has been criticized as counter to policies of self-determination by persons with disabilities.

The safety exclusion is narrow. Courts construing analogous provisions under the Rehabilitation Act of 1973 have been particularly hesitant in finding that an individual presents a threat to his or her own health or safety if employed in a particular position.[90] The EEOC's Interpretive Guidance gives as an example as an impermissible exclusion a law firm's refusal to hire an individual with a history of disabling mental illness out of fears that the stress of trying to make partner would trigger a relapse.[91] A generalized fear is not sufficient. The threat of harm must be imminent and substantial.[92] The regulations defining "direct threat" provide, "the determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This **assessment shall be based on reasonable medical judgment** that relies on the most current medical knowledge and/or on the best available objective evidence."[93] The EEOC lists four factors to consider in making this determination: 1) the **duration** of the risk; 2) the **nature and severity** of the potential harm; 3) the **likelihood** that the potential harm will occur, and 4) the **imminence** of the potential harm.[94]

A specialized "threat of harm" defense is available to employers hiring individuals involved with food handling. The Secretary of Health and Human Services is to publish annually a list of all communicable diseases which may be transmitted through food handling. If an individual with one of these diseases is employed or applies for a position in food handling, the employer may refuse to assign that individual to a food handling position if the risk of transmission cannot be eliminated through reasonable accommodation.[95]

PART 2: PUBLIC ACCOMODATIONS

Introduction

The public accommodation provisions of the ADA, incorporated in Title III of the Act, may well prove to generate the most conflict.[96] Although these provisions do not have the complexity of the employment provisions, they are far-reaching. The requirements are **applicable to all places of public accommodation operated by private entities, regardless of size**. The employment provisions, in contrast, reach only businesses that employ 15 or more people. **The goal of Title III is to make accessible all businesses and services open to the public to persons with disabilities**. This accessibility should be in the most integrated setting appropriate.[97] Title III prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, (or leases to) a place of public accommodation."[98] The Act addresses **discrimination in both the use of facilities and in architectural barriers**.

Entities Covered Under Title III

Title III is applicable to public accommodations. **The provisions of the title related to eliminating architectural barriers in new construction and alterations to existing construction also cover commercial facilities**. In addition, "**any person that offers examinations or courses** related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes" must offer these examinations or courses in "a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."[99]

Although the statutory language of the ADA does not distinguish between *a place of public accommodation* and *a public accommodation*, the regulations issued by the Department of Justice to implement Title III draw this distinction. To be a "**place of public accommodation**" three criteria must be met:

- The facility must be **operated by a private entity**. (Facilities operated by public entities are covered by Title II).
- The facility's operations **must affect commerce**. (This is a broad reach which, as a practical matter, does not exclude any facility.)
- The operations of the facility must fall within one of twelve broad categories:

1) a place of lodging;
2) an establishment serving food or drink;
3) a place of exhibition or entertainment;
4) a place of public gathering (such as an auditorium, convention center, or lecture hall);
5) a sales or rental establishment;
6) a service establishment (such as a beauty salon, dry cleaner, funeral parlor, gas station, lawyer's office, doctor's office, etc.);
7) a station used for specified public transportation (such as a terminal or depot);
8) a place of public display or collection (such as a museum, library or gallery);
9) places of recreation;
10) places of education;
11) social service center establishments (such as a day care center, homeless shelter, food bank, adoption agency, etc.);
12) places of exercise or recreation (such as bowling alleys, health spas, golf courses, etc.).[100]

These categories encompass **most places of business open to the public**.

The term "**public accommodation**," on the other hand, applies to "**a private entity that owns, leases (or leases to), or operates a place of public accommodation.**"[101] The statutory language suggests **liability for both a landlord and tenant** if the tenant operates a place of public accommodation and fails to comply with architectural requirements of the ADA, but the regulations issued by the Justice Department provide, "as between [landlord and tenant] allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract."[102]

"**Commercial facilities**" are distinguished from places of public accommodation. The term covers commercial operations which are **not generally open to the public**, such as factories, warehouses, and office buildings.[103] Exempted from the definition of "commercial facility" are certain means of transportation and entities which are covered or exempted by the Fair Housing Act of 1968. **Commercial facilities are subject to the provisions of Title III which require architectural accessibility in new construction and alterations to existing construction, but are not subject to other provisions of Title III.**

Exempted from coverage under Title III are religious organizations, entities controlled by religious organizations and private clubs or establishments. The religious entity exemption applies even where a religious organization undertakes an activity which would otherwise make it a public accommodation, such as the operation of a nursery or elementary school, even if such a school is open to the general public. On the other hand, **if the religious organization rents space to a secular entity**, such as when space in a church is rented to a private entity to be used for a daycare but the daycare will not be controlled by the religious entity, then **Title III is fully applicable to the operations of the private entity.**[104]

The private club exemption is the same as that contained in the public accommodation provisions of the Civil Rights Act of 1964.[105] In determining whether a private club is truly private and therefore exempt, courts, in construing the Civil Rights Act of 1964, have looked to whether the club has selective membership criteria, whether substantial membership fees are charged, the extent to which the facilities are open to the public, the extent to which members control club operations, whether there is public funding, whether the facility operates on a nonprofit basis, and whether the club was established in order to avoid the mandates of civil rights laws.[106] Consistent with the exemption for private clubs contained in the Civil Rights Act of 1964, **private clubs are covered by the ADA to the extent the facilities are made available to the customers and patrons of a public accommodation.** Therefore, if a private club leases space to an entity which operates a place of public accommodation, the private club is subject to the ADA as one who leases to a place of public accommodation.[107] For example, if a private club leased space to a teacher of a martial arts class, the club would be subject to the ADA as a lessor to a place of public accomodation. This would not affect the internal functions of the club but would impose obligations upon it to the participants in the martial arts class.

Obligations for Public Accommodations

Title III contains a general prohibition against discrimination on the basis of disability in the "**full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.**"[108] This prohibition reaches **both intentional discrimination and acts which have a disparate impact on persons with disabilities, such as architectural barriers.**[109] Specific acts which constitute unlawful discrimination are listed, which are subdivided into general and specific prohibitions.

Under the general prohibitions, it is unlawful to deny an individual or class of individuals, on the basis of disability, an equal opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.[110] For example, **a public accommodation can no longer exclude someone with a disability because its insurance coverage or rates are dependent on such an exclusion**, as was frequently done in the past.[111] Similarly, a public accommodation **may not provide unequal benefits to persons with disabilities,**[112] such as limiting persons with disabilities to certain theater performances.[113] There is also a prohibition against providing separate benefits. However, separate benefits may be provided if it is the only means of providing an individual with a disability goods or services equal to those enjoyed by persons without disabilities.[114] A public accommodation may not require a person with a disability to participate in a separate program, however.[115] Thus, a museum may provide a separate tour for the blind that allows participants to touch sculpture but it may not prohibit a blind patron from touring the museum at his or her own pace as would any other patron.[116]

As in the employment provisions, the prohibition against discrimination in public accommodations reaches discrimination against **persons or entities associated with a person with a disability** as well as discrimination against the person with a disability.[117] Entities as well as individuals are protected. A daycare center could not refuse admission to a child because her brother was HIV positive. Similarly, a landlord could not terminate a lease because an entity was operating a social service for persons with disabilities, such as an independent living center or counseling center.[118]

Under the specific acts of discrimination which are prohibited, **a public accommodation may not apply eligibility criteria which tend to screen out persons with disabilities unless the criteria can be shown to be necessary to the provision of the goods, services, or accommodations being offered.**[119] It would be impermissible, for example, for a public accommodation to ask on credit applications whether an individual has a disability such as HIV disease, epilepsy, mental illness, or other disability. Similarly, it would be unlawful for a retail establishment to require a driver's license before accepting a check because such a requirement would screen out certain persons with visual disabilities that prevented them from obtaining a driving license.[120] Neutral rules which tend to screen out certain individuals with disabilities are permissible if necessary for the safe operation of the public accommodation. A rafting expedition could require swimming proficiency, for example, or an amusement ride could apply certain height restrictions on participants.[121]

In addition to not applying criteria which tend to screen out persons with disabilities, **a public accommodation must make modifications in policies, practices, and procedures when such modifications are necessary to provide goods and services to persons with disabilities.**[122] **An exception is provided where the necessary modifications would fundamentally alter the nature of the goods and services.** Thus, although a clothing store may have a policy of allowing only one person in a dressing room, this policy would have to be altered if a mentally retarded person needed the aid of an attendant in trying on clothes;[123] a restaurant that prohibited animals would have to modify its policies to allow the use of a seeing-eye dog.[124] The regulations specify that stores with check-out aisles must keep accessible check-out aisles open during store hours or otherwise assure that "an equivalent level of convenient service is provided to individuals with disabilities as is provided to others."[125]

The final two specific requirements will perhaps have the most dramatic impact on existing places of public accommodation. **One requires public accommodations to provide auxiliary aids to persons with disabilities who need these aids and services to enjoy the goods,** services, and facilities of the public accommodation unless the public accommodation can show that **the provision of these aids and services would fundamentally alter the nature of the goods, services or facilities provided or the provision would result in an undue burden on the public accommodation.**[126] The second declares it **unlawful discrimination to fail to remove architectural barriers and communications barriers that are structural in nature in existing facilities where such removal is readily achievable.**[127] Justice Department regulations identify examples of the kinds of auxiliary aids which may be required. For example, qualified interpreters, computer-aided transcription services, telephone handset amplifiers, or telecommunications devices for deaf persons (TDD) may be required for individuals with hearing impairments; brailled or large-type material, audio recordings, or qualified readers may be required for individuals with visual impairments. Any public accommodation that offers customers, clients, patients, or participants the opportunity to make outgoing telephone calls on more than an incidental basis (e.g., hotels, hospitals, etc.) must, upon request, provide TDD to individuals with hearing impairments or communication disorders. Closed caption decoders must be available at places of lodging that provide televisions in more than four guest rooms.[128]

A public accommodation may raise as a defense to the charge that it has failed to provide auxiliary aids, a claim that their provision would impose an undue burden or would fundamentally alter the nature of the goods or services offered. An **undue burden is one which imposes significant hardship or expense.**[129] This determination, like that for "undue hardship" under Title I, is to be made on a case-by-case basis, taking into consideration the resources available, safety requirements, the number of employees, the impact on the operation of the site, and the relationship to any parent corporation or entity.[130]

The requirement to remove architectural barriers where such removal is "readily achievable" does not have an antecedent in the Rehabilitation Act of 1973 or other federal disability law. **Removal is "readily achievable" where it is "easily accomplishable and able to be carried out without much difficulty or expense."**[131] Whether barrier removal is readily achievable is to be determined on a case-by-case basis, **considering, among other factors, the financial resources of the covered entity.**[132] The standard of accessibility required of existing facilities under this requirement is less rigorous than that applicable to new construction or to alterations.[133] Justice Department regulations list examples of steps that may be taken to remove architectural barriers. These include: the installation of ramps, making curb cuts in sidewalks and entrances, repositioning shelves, rearranging tables or display racks, widening doors, installing grab bars in toilet stalls, creating designated accessible parking spaces, removing high pile, low density carpet, among others.[134] Whether any of these steps are readily achievable in a given case will depend on the circumstances of the public accommodation. Inclusion on the list is not determinative that in any particular setting, the step is readily achievable.

Defenses Available to Public Accommodations Charged with Discrimination

The individual prohibitions discussed above have specific defenses that have already been addressed. Thus, a claim that an auxiliary aid is not provided may generate a defense that provision of the aid would fundamentally alter the nature of the goods or services offered or would result in an undue burden; a claim that eligibility criteria tend to screen out individuals with disabilities may be met with a defense that such criteria are necessary to provide the goods or services being offered; a claim that modifications of policies, practices, or procedures should be made may be met with a defense that such modifications would fundamentally alter the goods or services offered. An additional defense, available against any claim of discrimination by a public accommodation is that participation by the individual with a disability would pose a direct threat to the health and safety of others.[135]

The Department of Justice has taken a **different approach than the EEOC** in defining "**direct threat.**" **Under the regulations implementing the public accommodation provisions, only threats to the health and safety of others, not threats to the health and safety of the individual with a disability, will provide a defense.**[136] A "direct threat" to the health and safety of others is a significant risk to others which cannot be eliminated by modification of policies, procedures or practices or by the provision of auxiliary aids.[137] The determination that an individual poses a direct threat must be based on an individualized assessment based on current medical knowledge or on the best available objective evidence.[138] The Justice Department rejected proposals that allowed a public accommodation to exercise its good faith judgment as to whether a threat was presented.[139]

New Construction, Alterations, and Public Accommodations

The ADA encompasses a vision of a future where virtually all workplaces and places of public accommodation will be readily accessible to persons with disabilities. This vision is embodied in the **provisions of Title III, which address new construction and alterations of existing facilities. These provisions apply not only to public accommodations; they apply to commercial facilities as well.**[140] Thus, workplaces as well as places open to the public are affected.

Under these provisions, **it constitutes unlawful discrimination to fail to design and construct facilities that are not readily accessible to persons with disabilities except where it is structurally impracticable.** To be readily accessible, a facility must be able to be "approached, entered, and used by individuals with disabilities (including mobility, sensory, and cognitive impairments) easily and conveniently."[141] The exception for structural impracticability is an exceedingly narrow one. It may apply, for example, where a building must be on stilts because it is being built over water or marshlands.[142] **Cost is not relevant to determining whether it is structurally impracticable.** Although the accessibility requirements apply to all places of public accommodation and commercial facilities, if such a facility is less than three stories or has less than 3,000 square feet, elevators are not required unless the facility houses a shopping center or mall, a professional office of a health care provider, or a public transportation terminal.[143] **The new construction provisions are applicable to any facility for which the last building permit or permit extension is certified to be completed after January 26, 1992, and for which the first certificate of occupancy is issued after January 26, 1993.**

Stringent requirements also apply to **alterations made to existing facilities after January 26, 1992**. To trigger the provisions of Title III, **an alteration must change the usability of the building**. Changes in wall configuration, remodeling, rearrangement of structural parts and similar activities trigger the alteration provisions of Title III. Normal maintenance, asbestos removal, and changes in electrical and mechanical systems do not trigger these provisions.[144] Any alteration must ensure, to the maximum extent feasible, that **the altered portions of the facility are readily accessible to persons with disabilities.**[145] In determining the feasibility of making alterations accessible, **cost is not a consideration**.[146]

In addition, **the path of travel to the altered area** and the restrooms, telephones, and drinking fountains servicing the altered area **must be readily accessible** unless the cost and scope of these alterations to the path of travel are disproportionate to the overall cost of the alteration.[147] **Alterations to the path of travel will be deemed disproportionate if they exceed 20% of the cost of the alteration to the primary area.**[148] Alterations that are not to primary function areas but are to work areas such as boiler rooms and supply storage rooms, do not trigger the path of travel provisions.[149]

The technical standards for accessibility, the ADA Accessibility Guidelines (ADAAG), have been promulgated by the Architectural and Transportation Barriers Compliance Board and incorporated as an appendix to the Department of Justice Regulations. These guidelines set out the standards applicable for determining whether new construction and alterations are accessible. They are extremely detailed, setting forth requirements for accessible parking, dimensions of toilet stalls, location requirements for water fountains, height requirements for restaurant counters, and so forth.

The Public Sector, Transportation, and Telecommunications

Other provisions of the ADA address discrimination in the public sector, transportation, and telecommunications.

TITLE II—DISCRIMINATION IN THE PUBLIC SECTOR:

Many public entities have already been subject to federal disability laws because they are recipients of federal funding. **Title II of the ADA extends coverage to all state and local governments, and departments, agencies, special purpose districts and other instrumentalities of states and local governments, as well as to the National Railroad Passenger Corporation and any commuter authority.**[150] Because Title II basically extends the coverage of section 504 of the Rehabilitation Act of 1973, the regulatory standards adopted to implement Title II are basically the same as those required under Section 504 of the Rehabilitation Act for recipients of federal funding. It also incorporates the standards applicable to Titles I and III to the extent these standards are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act.[151]

One significant difference between the ADA and the Rehabilitation Act of 1973 is that **states may be sued in federal courts under the ADA**.[152] The Supreme Court had held in 1985 that there was no abrogation of eleventh amendment immunity in the Rehabilitation Act of 1973, and therefore any suit against a state or its agencies had to be filed in state court.[153] The abrogation of this immunity is express in the ADA.

Title II is divided into two sections. The first provides that **no individual with a disability may be "excluded from participation in or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by such an entity."**[154] Regulations implementing this section have been issued by the Department of Justice.[155] The second part addresses public transportation and will be addressed in another subsection.

The prohibition against discrimination by public entities is far-reaching. Regulations identify general prohibitions against discrimination. These prohibit a public entity from doing anything that would tend to screen out persons with disabilities, or that would limit, on the basis of disability, the enjoyment of rights, privileges, or opportunities provided by the public entity.[156] Although Title I regarding employment reaches only those employers with 15 or more employees (or more than 24 employees until July 26, 1994), **all state and local government employers are covered through Title II regardless of size.**[157]

Title II also mandates accessibility requirements.[158] These requirements are applicable to programs rather than to facilities as in Title III. This approach allows a public entity to fulfill its duties under the act without undertaking extensive retrofitting of facilities. **Each service, program, or activity conducted by a public entity, when viewed in its entirety, must be accessible to and usable by persons with disabilities.**[159] A narrow exception exists where making the program accessible would fundamentally alter the nature of the service or program or where it would impose undue financial and administrative burdens.[160] This standard is significantly higher than the "readily achievable" standard in Title III[161] and requires the determination to be made by the head of the public entity, or his or her designee, after considering all resources available for the funding and operation of the service or program.[162]

Title II imposes accessibility requirements on new construction and alterations to existing facilities similar to the requirements imposed on public accommodations. New construction or alterations by public entities will be deemed accessible if they comply with either the ADAAG provisions applicable to public accommodations and commercial facilities or if they comply with the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. part 101-19.6, which are referenced in the regulations implementing section 504 of the Rehabilitation Act.[163] With the exception of the elevator exemption in ADAAG, the UFAS standards are somewhat less stringent than ADAAG.[164] **The elevator exemption contained in ADAAG is inapplicable to new construction or alterations undertaken by public entities.**[165]

Under other provisions of the regulations, public entities must take steps to ensure that **communications with persons with disabilities are as effective as communications with others.**[166] This requirement includes the provision of auxiliary aids where necessary. TDDs or equally effective telecommunication must be available to communicate by telephone with individuals with hearing or speech impediments.[167] Relay services are sufficient to meet this requirement[168] except for telephone emergency services, including 911 numbers. Telephone emergency services must provide direct access to individuals who use TDDs or computer modems.[169]

A public entity, unlike a public accommodation, is required to undertake a self-evaluation to determine whether it meets the requirements of the Act and make any modifications necessary to come into compliance.[170] This requirement is modelled on regulations implementing Section 504 of the Rehabilitation Act of 1973.

TRANSPORTATION:

The requirements for accessibility of public transportation operated by public entities is addressed in Title II. Operations of privately-owned transportation systems are addressed in Title III. These provisions, and the regulations implementing them,[171] mandate accessibility requirements for public transportation and prohibit discrimination on the basis of disability.

TELECOMMUNICATIONS:

Title IV of the ADA is designed to increase the accessibility of telecommunications for hearing and speech impaired individuals. **It requires telephone companies and others engaged in providing interstate communications services through wire or radio to provide telecommunication relay services**. These services will enable users of TDDs and other nonvoice terminal devices to communicate with individuals who do not use such a device.

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Additional Reading

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76. I.G. (1630.14).
77. I.G. (1630.14).
78. 29 C.F.R. sec. 1630.14(b)(3).
79. *See* I.G. (1630.14) discussing post-offer psychological screening).
80. *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989).
81. 42 U.S.C.A. sec. 12112(c)(3)(B) & (4)(C); 29 C.F.R. sec. 1630.14(b).
82. 42 U.S.C.A. sec. 12112(c)(4)(B).
83. 42 U.S.C.A. sec. 12114(d).

84. 42 U.S.C.A. sec. 12203.
85. 42 U.S.C.A. sec. 12113(a).
86. 42 U.S.C.A. sec. 12113(b).
87. 29 C.F.R. sec. 1630.15(b)(2).
88. *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985).
89. H.R. Rep. 485(II), 101st Cong., 2d Sess. 74, reprinted in 1990 U.S. Code Cong. & Admin. News at 356.
90. *Bentivegna v. United States Dept. of Labor*, 694 F.2d 619, 622 (9th Cir. 1982).
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101. 28 C.F.R. sec. 36.104
102. 28 C.F.R. sec. 36.201(b).
103. 42 U.S.C.A. sec. 12181(2).
104. Anal. (36.104).
105. 42 U.S.C.A. sec. 12187.
106. Anal. (36.104).
107. Anal. (36.201).
108. 42 U.S.C.A. sec. 12182(a).
109. Anal. (36.204).
110. 42 U.S.C.A. sec. 12182(b)(1)(A)(i).
111. Anal. (36.202).
112. 42 U.S.C.A. sec. 12182(b)(1)(A)(ii).
113. Anal. (36.202(b)).
114. 42 U.S.C.A. sec. 12182(b)(A)(iii).
115. 42 U.S.C.A. sec. 12182(b)(1)(C); 28 C.F.R. sec. 36.203(b).
116. Anal. (36.203).
117. 42 U.S.C.A. sec. 12182(b)(1)(E).
118. Anal. (36.205).
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120. Anal. (36.301).
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123. Anal. (36.302).
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125. 28 C.F.R. sec. 36.302(d).
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146. Anal. (36.402).
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167. 28 C.F.R. sec. 35.161.
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169. 28 C.F.R. sec. 35.162.
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QUESTIONS BASED ON THIS LESSON

5. Which of the following is true?
    - A. The individual will still be considered qualified if the requirements which the individual cannot perform relate to marginal rather than essential elements of the job.
    - B. Under the ADA, an employer is required to give preference to a qualified applicant with a disability over other applicants
    - C. Title I of the ADA became effective for employers with 15 or more employees on July 26, 1992
    - D. "Covered entity" is a phrase meaning the prospective employee

6. The term "disability"
    - A. includes individuals currently engaging in the illegal use of drugs
    - B. includes individuals who have HIV disease
    - C. does not include individuals addicted to drugs in the past
    - D. includes individuals with DSM III-R sexual disorders such as pedophilia, voyeurism, and gender identity disorders

7. Which of the following is *not* considered when determining whether a job function is essential?
    - A. The amount of time spent on the job performing the function
    - B. The consequences of not having the incumbent perform the function
    - C. How much the employee would be paid for performing the job function
    - D. The work experience of past incumbents on the job

8. Which of the following statements is *false*?
    - A. The ADA prohibits an employer from requiring a demonstration of the applicant's ability to perform the function
    - B. Segregating non-work space such as lunch or break rooms would violate the ADA
    - C. If an accommodation significantly disrupts the business, it may impose an undue hardship
    - D. An action may be unlawful even if there is no discriminatory intent on the part of the covered entity

UNDERSTANDING THE
AMERICANS WITH DISABILITIES ACT

LESSON 3, PART 1

ACCOMMODATIONS for WORKERS with PHYSICAL DISABILITIES

Joseph E. Havranek, EdD

Presented by Directions in Rehabilitation

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Key Points

- *Physical barriers* in the workplace may serve to discriminate against qualified individuals with disabilities just as much as does overt exclusion.

- McCarthy presents three system models which are useful for placing the stigma of disability in a perspective that allows for the formation of practical goals to counteract the causes and effects of this stigma:
  - The *Clinical Services Model* attributes the problem of unemployment to some *failing(s) within the individual* who has the disability.
  - The *Social Systems Model* attributes the problem of unemployment to the *inaccessibility of the environment* in general and worksites in particular.
  - The *Career Development Model* attributes the problem of unemployment to a history of *exclusion from "normal" developmental milestones.*

- The ADA's efforts mainly target the obstacles outlined in the *Social Systems Model* by enforcing the *removal of barriers* and the *outlawing of discrimination.*

- Rehabilitationists can also help clients realize ADA goals by emphasizing *career development and early case identification*, and by *unifying* with other members of the rehabilitation profession.

- Employers who understand they will be helped as much as possible by the rehabilitationist in adopting creative solutions are often able to come to full terms with the requirements of the ADA much more readily.

- The rehabilitationist should also have some knowledge of potential sources of *financial assistance* available to employers, including tax incentives and credits.

- Turning the attention of employers *away from stereotypes* to the *individuals themselves* allows employers to integrate new information about the capabilities of disabled individuals.

Introduction

Persons with disabilities are gainfully employed at a rate only one-quarter to two-fifths that of the general working age population.[1] Many can perform jobs without any need for accommodations. But many others are excluded from jobs they are qualified to perform because of unnecessary barriers in the workplace and the work environment. The ADA recognizes that such barriers may discriminate against qualified people with disabilities just as much as overt exclusionary practices. Under the ADA, when an individual with a disability is qualified to perform the essential functions of a job but is prevented from doing so by physical barriers at the worksite, an employer must try to find a reasonable accommodation that would enable the person to perform these functions.[2]

The ADA sets two broad criteria for the rehabilitationist to consider when determining whether an individual who is disabled meets the protective requirements of the Act. These are:

1) **If the individual meets the necessary requirements for the job in terms of education, training, experience, etc.**
2) **If the individual possesses the capacities (physical and mental) to perform the essential functions of the job, with or without reasonable accommodation.**

Before attempting to resolve the inequities faced by persons with physical disabilities who seek entry into the job market, it is necessary first to identify and isolate the particular obstacles faced by this population. Since each problem presents unique challenges, it is essential that each situation be addressed with the appropriate resources. **McCarthy[1] presents three system models** that are useful for placing the stigma of disability in a perspective that allows for the formation of practical goals to counteract its causes and effects.

McCarthy's Clinical Services Model attributes the problem of unemployment to some failing(s) within the individual who has the disability. It includes such variables as functional limitations, poor motivation to work, social skills deficits, occupational skill deficits, and job search skills deficits.

The Social Systems Model attributes the problem of unemployment to the inaccessibility of the environment in general and worksites in particular. It includes architectural and worksite inaccessibility, lack of accessible and affordable transportation, disability income and benefits disincentives, tight labor market conditions and policies, and prejudice of employers and co-workers.

The Career Development Model attributes the problem of unemployment to a history of exclusion from "normal" developmental milestones. This model may include such issues as a short-sighted perspective on the part of the disabled individual (finding a job instead of developing a career), neglected or sheltered work socialization, unilateral and isolated approaches to vocational programming, narrow concepts and application of accommodation for employment, and insufficient self-responsibility for career activities and outcomes.

Empowerment is the key to unlocking individuals from the confines of stigma. **The Clinical Services Model demonstrates the need for emphasizing functional capabilities that the client already possesses.** Counselors can also establish causes of poor motivation and deal with them on an individual basis. Rehabilitationists have traditionally excelled in helping compensate for and overcome skill deficits, and this should continue.

With the passage of the Americans with Disabilities Act, **the efforts of rehabilitationists are now being supported by legislation enforcing the removal of access barriers and the outlawing of employer discrimination. Thus, the ADA's efforts mainly target**

the obstacles outlined in the Social Systems Model. The involvement of rehabilitationists in diverse settings and service areas will continue to be a part of increasingly productive lives of people with disabilities. When coupled with attempts to incorporate financial incentives to work that involve rehabilitation intervention (e.g., Work Incentive Programs for recipients of Social Security and Supplemental Security benefits, Wage Loss provisions to Workers' Compensation, etc.), the role of the rehabilitationist assumes greater prominence.

Accommodations

Accommodations required by the ADA apply to a broad spectrum of human activities including employment, public services, public accommodations, and telecommunications. An accommodation is simply any intervention that facilitates a person's ability to carry out a function. For example, an amplified telephone receiver or a TDD are examples of accommodations that can be both work and leisure oriented. Modifications that are specifically job oriented include, for example, a new machine control device or a division of work duties across a department.

Realization of ADA goals will also be attained through the altering of obstacles described in the Clinical Services Model. Emphasis on career development, early case identification, and unification among members of the rehabilitation profession will assist with some of these problems. The new accommodations for employment require a well-informed rehabilitation community to assist in the implementation of the legal requirements.[2]

In order to achieve a match between a worker and a job or other activity, one can alter either the individual or the task. One resource to use in this evaluation is **Job Analysis**,[3] a book available through the Government Printing Office for $12. This technique allows for an accurate assessment of job demands as well as potential modifications on the part of the person with a disability or the work site.

Basic questions to ask when performing job analysis:

1) What are the essential job functions?
2) Are these requirements reasonable, legitimate and necessary for the position?
3) Which of the essential functions can be performed by the disabled person in question?
4) What specific accommodations would otherwise qualified persons with disabilities need to perform the tasks?
5) What impact will those accommodations have on the organization in terms of cost, administrative burden and business necessity?[4]

By participating actively in these changes in service delivery models, rehabilitationists can become agents of empowerment and thus fulfill their mission. **Since self-responsibility for the client is the ultimate goal of rehabilitation services, the role of the rehabilitationist ideally diminishes as the relationship progresses**, with the client assuming a larger share of responsibility for his or her own activity. Rehabilitation professionals should not, then, be satisfied with less than maximum empowerment of the client.

A similar approach, applied primarily to non-work-related facilities, is a **Location Analysis**.[5] The Location Analysis considers such issues as availability of public transportation, building accessibility, rest rooms, fire exits, and health and safety provisions. Knowledge of the methodology associated with these procedures was important before, but it is now critical. A one-day workshop provided by the National Rehabilitation Association at regular intervals throughout the country has proven to be very helpful to many who have attended it.

Rehabilitationists should also be aware of practices that have been specifically prohibited by the ADA. These include: **limiting the duties of an individual based on presumptions about that person's ability** to perform certain tasks; **adopting separate lines of progression for employees with disabilities** based on the presumption that no such individual would be interested in moving into a particular job; **denying employment based on generalized fears** about the safety of the applicant or higher rates of absenteeism; **assigning (or re-assigning) employees with disabilities to one particular office or installation; requiring employees with disabilities to use only particular employer-provided facilities,** such as segregated break rooms, lounges, or lunch rooms; **denying a job, promotion, or benefits to a qualified able-bodied individual because he or she has a relationship or association with a person with a disability** (such as the spouse of an HIV-infected person); and **administering tests in a manner that fails to reflect accurately the skills, aptitude, or other factors intended to be measured and required for job performance.**

Employer Objections to Accommodation

Employers are not required to hire and/or accommodate otherwise qualified persons with disabilities if that hiring involves "**direct threat** to the health or safety of himself/herself or others" or if the provision of accommodations would impose an **undue financial hardship** on the employer. **Creativity, coupled with a basic understanding of ergonomics,** can resolve many of the problems perceived by employers. For example, simply raising, lowering, or rearranging a work station is often sufficient accommodation. In other instances, more complex solutions are required. **Employers who understand they will be helped as much as possible by the rehabilitationist in adopting creative solutions to obstacles are often able to come to full terms with the requirements of the ADA much more readily.**

Other examples of inexpensive accommodations are noted by Kathleen Sullivan in the Midlands Business Journal:

- A telephone amplifier designed to work with a hearing aid allowed a plant worker to retain his job and avoid transfer to a lower-paying job. Cost = $24.00
- A telephone headset allowed an insurance salesman with cerebral palsy to write while talking with clients. Rental Cost = $6.00/month
- A person working in a food service job who had use of only one hand could perform all tasks except opening cans. She was provided with a one-handed can opener. Cost = $35.00

For additional examples, please see the table on page 3-8.

The rehabilitationist should also have some knowledge of **potential sources of financial assistance available to employers.** These **tax incentives** include deductible and capital expenditures of the "ordinary and necessary" test of IRC Section 162; the special provision for tax treatment of expenditures to remove architectural barriers to the disabled contained in the Tax Reform Act of 1976 (IRC Section 190); small business tax credits for public accommodation access expenditures enacted in 1990 (IRC Section 44); and the Targeted Jobs Tax Credit, which provides a credit against taxes for employers who hire members of certain targeted groups—among whom are people with disabilities under a rehabilitation plan (IRC Section 51).

Attitudes of employers toward those with disabilities tend to contribute to the retention of negative attitudes toward those individuals in general society. Degree of visibility and knowledge about a particular disability seem to be the most critical areas upon which employment decisions are based.[6] For example, Fuqua[7] found that employers were more willing to hire amputees and epileptics than the mentally ill and blind. Therefore, **it is imperative that rehabilitation professionals be knowledgeable about the actual abilities and limitations of each of their clients. Turning the attention of employers away from stereotypes to individuals** allows them to integrate new information about the capabilities of individuals with disabilities.

Conclusion

The role of the rehabilitationist in implementing the ADA is critical to the transition of a nation in which each individual will be regarded as having capabilities that can be utilized in more productive ways. Although The Rehabilitation Act of 1973 did require similar action on the part of government agencies and contractors, the rehabilitation profession did not utilize this law to its full potential. With the widening of coverage provided by the ADA, the profession as a whole and each individual within that profession must become involved and active in the implementation of the law to the fullest extent possible. **For the rehabilitation profession to fail to recognize the potential of this new legislation would not only be reprehensible, but might set a dangerous precedent for generations to come.**

The prospects for persons with disabilities at this time is the brightest it has ever been. Therefore, the opportunities for rehabilitationists to have a positive impact on the lives of their clients is also at a zenith. Together we can ensure the productive empowerment of persons with disabilities with the knowledge that the **"system" of which many of us have been critical is now squarely committed to that empowerment.**

About the Author

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EXAMPLES OF READILY ACHIEVABLE WAYS TO REMOVE ARCHITECTURAL AND COMMUNICATIONS BARRIERS

CONDITION—VISUAL IMPAIRMENTS

SUGGESTIONS:

- Use large-letter signs
- Remove displays or other objects in path of travel
- Use "talking" calculators or computers
- Add raised or braille lettering to elevator control buttons or door signs
- Raise low-hanging signs or lights
- Increase frequency of existing oral announcements
- Make optical magnifiers available
- Install entrance indicators such as strip of textured material near doorways, elevators, etc.
- Provide audiotapes of texts/menus
- Have servers or sales clerks read menus or price tags

CONDITION—MOBILITY IMPAIRMENTS

SUGGESTIONS:

- Add a ramp to cover 1 or 2 steps
- Install grab bars in bathrooms
- Rearrange tables in restaurants
- Adjust layout of display racks or shelves to widen aisles
- Designate special accessible parking spaces
- Lower towel dispensers in restrooms
- Raise desks with blocks or use simple crank-style drafting tables as alternatives to standard desks
- Add paper cup dispenser at water fountains
- Lower telephones
- Use floor coverings that allow easy mobility, e.g. non-skid surfaces or low carpet
- Make curb cuts in sidewalks and entrances

CONDITION—HEARING IMPAIRMENTS

SUGGESTIONS:

- Provide written notice of oral announcements
- Install warning lights for fire and burglar alarms and doorbells
- Train employees in basic sign language
- Provide small sound amplifiers for telephones
- Purchase telecommunication devices
- Rearrange work stations to face toward co-workers
- Provide paper and pencils at sales counters
- Improve sight lines by replacing oval tables with round tables

CONDITION—TACTILE IMPAIRMENTS

SUGGESTIONS:

- Use level door handles
- Use "Lazy Susans" which allow people to rotate equipment without reaching
- Lower tension on doors and water fountains
- Buy automatic staplers
- Attach items or equipment with Velcro™

CONDITION—MENTAL/COGNITIVE IMPAIRMENTS

SUGGESTIONS:

- Use large-letter signs
- Use simple words or illustrations on signs
- Color-code materials
- Replace written job testing with on-the-job tryouts or verbal exams

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QUESTIONS BASED ON THIS LESSON

9. The removal of barriers and outlawing of discrimination mainly target the areas defined in McCarthy's

A. Clinical Services Model

B. Social Systems Model

C. Career Development Model

D. None of the above

10. Which of the following practices has not been prohibited by the ADA?

A. administering tests in a manner that accurately reflects the skills and aptitude intended to be measured and required for job performance

B. adopting separate lines of progression for employees with disabilities

C. requiring employees with disabilities to use only particular employer-provided facilities

D. denying a job, promotion, or benefits to a qualified able-bodied individual because he or she has a relationship or association with a person with a disability

11. Job analysis

A. allows for an accurate assessment of job demands

B. helps in determining potential modifications on the part of the person with a disability or the work site

C. Both of the above

D. None of the above

12. The rehabilitationist's role

A. ideally increases as the relationship progresses

B. is, under the ADA, antagonistic to the employer

C. should be that of a creative resource for both client and employer

D. should be removed from all financial issues

UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT

LESSON 3, PART 2

ACCOMMODATIONS for WORKERS with PSYCHIATRIC DISABILITIES

Laura Mancuso, MS, CRC

Presented by Directions in Rehabilitation

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Key Points

- Individuals with certain psychiatric disabilities such as *schizophrenia, bipolar disorder, and severe depression* are covered by the ADA.

- Certain psychiatric diagnoses (transvestism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, and pyromania) are *excluded* from the definition of "disability."

- Since it is unlikely that the employer will know an applicant has a psychiatric disability unless he or she chooses to disclose that fact, the potential *benefits of disclosure may be compromised* by the risk of triggering *severe stigmatization.*

- Rehabilitation professionals need to *reframe the discussion* between workers and employers in terms of *functional limitations* rather than psychiatric *symptoms.*

- *Functional limitations* may include: maintaining concentration over time; screening out external stimuli; maintaining stamina throughout the work day; managing time pressure and deadlines; initiating interpersonal contacts; focusing on multiple tasks simultaneously; responding to negative feedback; formulating and executing a plan of action; overcoming unexpected obstacles; and maintaining orientation in unfamiliar surroundings.

- *Accommodations* for workers with psychiatric disabilities may include: modifications to the supervisory process, job modification, modification of the physical environment, modification in policies, schedule modification, or provision of human assistance.

Introduction

The legislative development of the ADA primarily focused on the protection of individuals with physical disabilities to the exclusion of those with psychiatric disabilities. But advocates from many groups joined together to contest the proposed disability-specific exclusion, with the result that **people with psychiatric disabilities (such as schizophrenia, bipolar disorder, and severe depression) are now covered by the ADA.** This definition is based on functioning in major life actvities rather than on symptom level.

A compromise was reached in which **certain psychiatric diagnoses (as listed in the DSM-III-R)[1] are excluded from the definition of "disability."** These are: transvestism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, and pyromania.[2] Along with psychoactive substance use and disorders resulting from current illegal use of drugs, these are the only impairments specifically excluded from the definition of "individual with a disability."

Individuals discriminated against on the basis of a past history of psychiatric hospitalization or outpatient psychotherapy would be protected under the "record of an impairment" clause, even if they have recovered completely and are no longer engaged in treatment. **Individuals who are "regarded as" having a psychiatric disability are also protected.** For example, someone with visible scars from a past suicide attempt would be covered if they are denied equal employment opportunity based on discriminatory assumptions about their current abilities.

Stigma and Self-Disclosure

Stigma presents a fundamental barrier to job development for workers with **psychiatric** disabilities. Having completed years of specialized training, rehabilitation counselors may forget that the general public has few sources of accurate information about the impact of disabilities on individuals' vocational capacities. Employers' attitudes may be formed by media images portrayed in Hollywood movies or human interest stories in newspapers about "supermen" and "superwomen" who "overcame" their disabilities to accomplish great feats. Some rehabilitation counselors report anecdotal information that managers with personal or familial experiences of disability are often the most receptive.

In the ADA, Congress acknowledges the prevalence and detrimental effects of stigma. The Preamble to the ADA states that "individuals with disabilities...have been faced with...a history of purposeful unequal treatment...based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the...ability of such individuals to participate in, and contribute to, society."[3]

People with psychiatric disabilities may be the most stigmatized group granted protection under the ADA. A study published in 1986 asked employers to rate the "employability" of persons with various disabilities. In general, "physical problems were rated as easier to accommodate than mental and emotional problems."[4] More recently, a 1992 study conducted by Louis Harris & Associates examined the "degree of comfort" among adults in the U.S. with people with disabilities. They found that "**mental illness causes the greatest unease,** followed by facial disfigurement, senility, and mental retardation. Deafness, blindness, and use of a wheelchair, while upsetting to some, engender considerably less discomfort."[5] **For example, 59% of those surveyed reported feeling "very comfortable" when meeting someone using a wheelchair, while only 19% felt that way about a person known to have mental illness.**[6]

While no law can erase negative beliefs about people with disabilities, the ADA, like other civil rights laws, attempts to reduce the effects of stigma by outlawing certain discriminatory behaviors. For example, employment agencies are prohibited from categorically screening out applicants with disabilities. And employers who rely on such employment agencies are themselves liable for discrimination suits. While stopping short of imposing affirmative action requirements, the ADA does require employers to take proactive steps to give people with disabilities an equal opportunity to work by making accommodations.

The ADA creates a basic dilemma for people with "hidden disabilities." Because the law cannot instantaneously erase stigma, disclosure of the presence of a disability to a potential employer or to co-workers still carries risks. In addition, the law clearly states that employers are only required to make accommodations to the "*known* physical or mental limitations"[7] of qualified applicants or employees. Further, because the ADA prohibits pre-employment inquiries about the presence of a disability, **it is unlikely that the employer will know an applicant has a psychiatric disability unless he or she chooses to disclose that fact.**

The potential benefit of disclosure for the worker is the opportunity to negotiate a desired accommodation. But disclosure also carries the risk of triggering severe stigmatization. The need for rehabilitation counselors to apply their interpersonal skills to support their clients in weighing these costs and benefits becomes increasingly urgent under the ADA.

Accommodations

In the two years between the enactment of the ADA and the effective date of its employment provisions, rehabilitation counselors, employers, and people with psychiatric disabilities have asked, "What are reasonable accommodations for workers with psychiatric disabilities?"

Examples of reasonable accommodations in the law and its employment regulations include: making employer-provided transportation accessible; providing reserved parking spaces; providing a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips; or permitting an individual who is blind to use a guide dog at work. However, **the law provides little guidance on developing accommodations for workers with psychiatric disabilities.**

Accommodations for workers with psychiatric disabilities must respond to their unique functional limitations. To facilitate the development of these accommodations, **rehabilitation counselors need to reframe the discussion between workers and employers in terms of functional limitations rather than psychiatric symptoms.** It is impossible to make accommodations to "schizophrenia." But it is possible and helpful to make accommodations that bridge the gap between a worker's functional limitations and the demands of his or her job.

Some of the **functional limitations that have been noted among workers with psychiatric disabilities include:**

·maintaining concentration over time

·screening out external stimuli

·maintaining stamina throughout the work day

·managing time pressure and deadlines

- initiating interpersonal contacts
- focusing on multiple tasks simultaneously
- responding to negative feedback
- formulating and executing a plan of action
- overcoming unexpected obstacles
- maintaining orientation in unfamiliar surroundings

Once an individual has disclosed his or her disability and the need for an accommodation has been established, the rehabilitation counselor should consult with the worker about potential accommodations. Although it is difficult to generalize about accommodations to meet the broad array of needs among workers with psychiatric disabilities, the following examples may help to stimulate ideas:

MODIFICATIONS TO THE SUPERVISORY PROCESS

- Arranging for work requests to be put in writing for a worker who becomes confused when given verbal instructions or has short-term memory loss
- Training a supervisor to give positive feedback along with criticisms of performance
- Allowing a worker who personalizes negative comments about his/her work performance to provide a self-appraisal before receiving feedback from a supervisor
- Establishing a written agreement between worker and supervisor for intermediate-term performance indicators
- Individualizing job training for a worker who has difficulty learning due to anxiety

JOB MODIFICATION

- Arranging for someone who cannot drive or use public transportation to work at home
- Restructuring a job to eliminate secondary tasks by exchanging those tasks for part of another employee's job description
- Reassignment to a vacant position

MODIFICATION OF THE PHYSICAL ENVIRONMENT

- Assigning an enclosed office to an entry-level worker who loses concentration and accuracy in a noisy room

MODIFICATION IN POLICIES

- Extending additional unpaid leave during a psychiatric hospitalization
- Allowing a worker whose psychotropic medications cause excessive thirst to consume fluids while working

SCHEDULE MODIFICATION

- Allowing a worker to shift his/her schedule by 1 hour twice per month to attend psychotherapy appointments
- Job-sharing and other part-time arrangements
- Use of sick leave for emotional and cognitive reasons, not just physical reasons

PROVISION OF HUMAN ASSISTANCE

- Paying for or cooperating with a job coach
- Designation of a peer mentor through regularly scheduled meetings

These examples illustrate several important points. First, **employers may provide accommodations merely by cooperating with a supported employment service provider, even if they do not pay for the services.** This is analogous to allowing a worker to be assisted by a sign language interpreter or guide dog at the work place, without actually funding the accommodation. Second, **medical treatment that is necessary to control symptoms may actually impose functional limitations.** For example, drugs used to treat mental illnesses may cause tremors, dry mouth and excessive thirst, muscle stiffness, restlessness, or involuntary hand or mouth movements. **These conditions should be treated no differently from the functional limitations imposed by the medical condition itself.** Finally, **while many of the accommodations named above might improve the quality of worklife for many nondisabled workers, they can "make or break" an employment opportunity for someone with a psychiatric disability.**

Overcoming Employer Objections to Making Accommodations

Rehabilitation professionals are uniquely positioned to assist employers and workers with disabilities to negotiate accommodations. They can offer experience gained from assisting dozens of workers in similar situations, access to current rehabilitation literature, and familiarity with local community resources that might help pay for accommodations.

Employers frequently express the concern that accommodations will be expensive. Most of the examples of accommodations for workers with psychiatric disabilities listed above require sustained effort, but little or no expense. A study of accommodations made by federal government contractors under Section 503 of the Rehabilitation Act of 1973 found that over half of the accommodations cost nothing, with an additional 30% costing less than $500. A basic finding of the study was that making accommodations required more "creative problem solving than money."[8]

The ADA requires employers to seek external funding for needed accommodations that pose an "undue hardship" due to cost.[9] If cost is the only barrier, it is not a sufficient defense for the employer to assert that the funds are not available within the covered entity's budget. Employers may be unaware of resources available through the State Department of Rehabilitation or local human service agencies. Similarly, they may be unfamiliar with the **I.R.S. tax credits for small businesses that can help offset the costs of ADA compliance**, including the expense of making accommodations. Rehabilitation counselors can make a major contribution in these cases by informing employers and workers about these external resources.

Employers may also express concern that **accommodations made for workers with "hidden disabilities" (such as schedule modifications) may seem desirable to other employees.** This situation can create a conflict for supervisors, particularly if the worker has chosen not to disclose the disability to his or her peers. **The ADA specifies that employers can request "documentation" of the need for an accommodation when such need is not obvious.**[10] In this case, rehabilitation counselors may provide or obtain documentation of the need and facilitate an agreement between the worker and the employer about how much information will be disclosed to other employees. In most cases, it is sufficient for the supervisor to respond to such inquiries by saying only that the worker has a "medical need" for the accommodation. **The documentation need not specify, and the supervisor should not disclose, specific information about the person's diagnostic label, course of treatment, or prognosis.**

The ADA's Potential for Change

There is great potential for positive change in the age of the ADA. A small number of workers with disabilities will gain reinstatement, back pay, or damages by charging employers with discrimination. But a far greater number of workers will benefit from **employers' increased awareness of people with disabilities as qualified workers.** Even the publicity around passage of the ADA has raised awareness among the general public about the abilities of this large segment of our population. The specialized skills and experience of rehabilitation counselors makes them uniquely qualified to utilize the ADA to produce benefits for both employers and workers with disabilities—including those with psychiatric disabilities.

About the Author

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QUESTIONS BASED ON THIS LESSON

13. Which of the following statements is *true*?
    - A. The risk of severe stigmatization outweighs the benefits of disclosing psychiatric disability in the workplace
    - B. An employer is not required to provide accommodations for any undisclosed psychiatric disabilities
    - C. Individuals who are "regarded as" having a psychiatric disability are not protected under the ADA if no such disability actually exists
    - D. Since psychiatric disorders are often "hidden," persons with psychiatric disabilities are probably the least-stigmatized group granted protection under the ADA

14. Which is *not* a functional limitation characteristic of psychiatric disabilities?
    - A. Initiating interpersonal contacts
    - B. Screening out external stimuli
    - C. Managing time pressure and deadlines
    - D. None of the above

15. Which disorder is covered under the ADA?
    - A. Severe depression
    - B. Kleptomania
    - C. Pedophilia
    - D. Compulsive gambling

16. Which of the following statements is *false*?
    - A. Rehabilitation professionals need to reframe the discussion between workers and employers in terms of functional limitations rather than psychiatric symptoms
    - B. Assigning an enclosed office to an entry-level worker who loses concentration and accuracy in a noisy room is an example of a modification to the physical environment
    - C. Employers should always thoroughly explain the disabled employee's diagnostic label, course of treatment, and prognosis to co-workers so they will not be jealous of any accommodations that may be made
    - D. Employers may request medical documentation of the need for an accommodation when such need is not obvious

UNDERSTANDING THE

AMERICANS WITH DISABILITIES Act

LESSON 4

VOCATIONAL ASSESSMENT and the ADA: ISSUES and APPROACHES for the REHABILITATION PROFESSIONAL

Stephen W. Thomas, EdD, CVE, CRC

Presented by Directions in Rehabilitation

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Key Points

- The key to a successful ADA-based vocational evaluation or assessment is the accurate *identification of functional strengths and limitations*, and the *determination of reasonable accommodations* that can minimize or eliminate the identified limitations.

- Assessment may be *formal* or *informal*. The informal procedure, often called *vocational assessment*, uses techniques such as file review, interviewing, functional assessment, and the administration of a few standardized tests.

- The formal procedure, *vocational evaluation*, incorporates more comprehensive and formalized procedures such as extensive testing, work sample administration, behavior observation, situational assessment, and on-the-job evaluation.

- Most functional assessment forms identify those functional aspects associated with "major life activities" (e.g., hearing, memory, endurance, motor speed, perception, learning ability); many forms use *descriptive appraisals rather than discrete or continuous rating scales*. However, there is often a lack of uniformity and standardization among these methods.

- *Standard deviation* can be used to assess "severity of the impairment" along with a content-based comparison of the individual's current functioning to the demands of work and other life activities.

- To help determine which accommodations may be needed, the rehabilitation professional should undertake a *comprehensive job analysis* which focuses on four primary criteria: a description of the duties of the job, an evaluation of the difficulty level of the duties, a consideration of the physical or environmental setting, and a rating of the importance of each duty.

- To avoid using instruments and techniques that serve to screen clients out of jobs and services, rehabilitationists need carefully to choose tests and work samples that *evaluate people's abilities rather than their disabilities.*

Introduction

The Americans with Disabilities Act (ADA) is designed to promote and enhance the rights of persons with disabilities with respect to five areas: Employment, Transportation, Public Accommodations, State and Local Government, and Telecommunications. **Title I of the Act provides for equal employment opportunities for persons with disabilities based on merit rather than quotas.** This appropriate focus on merit requires that rehabilitation professionals work closely with their clients to prepare them for the demands of the jobs they desire. However, the ADA is more than a law—it is a commitment to ensuring that qualified individuals with disabilities are "given the same consideration for employment that individuals without disabilities are given."[1]

This lesson will focus on **Title I: Employment, as it relates to 1) diagnosis of disability and 2) vocational evaluation and assessment of persons with disabilities.** It will interpret those sections of the Act that are pertinent to vocational assessment and will suggest practical approaches to implementing appropriate evaluation strategies.

Because this Act was passed relatively recently, sufficient case law is not available to provide a definitive interpretation. However, case law from Section 504 of the Rehabilitation Act of 1973 can be used until the ADA has developed its own history. The ideas presented in this article are no more than suggestions and have been untested with regard to the ADA provisions. If a reasonable effort is made to administer the recommended procedures fairly and objectively, the rehabilitation professional may be viewed as acting in good faith.

Regulations to establish the qualifications of disabled individuals cover two distinct areas:

diagnosis: to **establish the existence of a physical or mental impairment that significantly limits major life activities**

assessment and evaluation: to **determine the functional strengths and limitations** of the individual with a disability and to **identify reasonable accommodations** to overcome the specified functional limitations

Within the rehabilitation process, **diagnosis** and verification of the impairment must be accomplished before a vocational assessment is initiated. It is **determined by a specialist (e.g., physician, psychologist) who is qualified to diagnose a physical or mental impairment.** Conditions which are covered under the ADA are the following:

1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine; or
2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[1]

Once diagnosis has established the existence of a physical or mental impairment, the impact of that disability on functioning levels can be assessed by a rehabilitation professional (e.g., rehabilitation counselor, vocational evaluator, rehabilitation specialist) either informally or formally.

Assessment

The informal procedure, often called **vocational**

sessment, involves the use of techniques such as **file review, interviewing, functional assessment, and the administration of a few standardized tests (e.g., interest, achievement, dexterity).**

The **formal procedure**, referred to as **vocational evaluation**, goes beyond the use of simple vocational assessment techniques to incorporate **more comprehensive and formalized procedures such as extensive standardized testing, work sample administration, behavior observation, situational assessment, and on-the-job evaluation.** Usually conducted by a qualified vocational evaluator, this process is **used when an informal assessment fails to yield sufficient information.** Vocational evaluations generally conclude with a report that details results and recommendations.

Although the diagnostic process can also identify functional levels, rehabilitation practitioners are able to use a variety of assessment and evaluation techniques to profile the types and degrees of functional strengths and limitations. **Assessment** can be effectively used to address the last two parts of the disability definition—"**substantially limits**" and "**major life activities.**"

The second critical element in the definition, "major life activities," means

> functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[1]

The interpretive section of the ADA in the *Federal Register* indicates that this is not an "exhaustive" list—it may also include other activities such as "sitting, standing, lifting, reaching."[1]

Functional Assessment

Functions is a key word used to describe major life activities that has been well defined and used within the field of rehabilitation.[2-5] Numerous inventories are commercially available, and many practitioners have modified existing forms or developed their own for specialized applications. Following are **two definitions of functional assessment** that relate to the requirements of the ADA:

> In simplest terms, functional assessment is a systematic enumeration of vocationally relevant strengths and limitations.[3]

This first definition, presented in Crewe and Athelstan's *Functional Assessment Inventory Manual*,[3] refers specifically to "**relevant strengths and limitations**" which become critically important when considering other ADA terms such as "substantially limits," "essential functions," and "reasonable accommodation." As indicated in the definition, **functional assessment should allow for the "systematic" review of all functional areas listed on an inventory.** Although this definition focuses on the phrase "vocationally relevant," most functional assessment forms are more broadly used and interpreted with regard to community functioning.

Given this need for more flexible utility, a second definition, presented by Halpern and Fuhrer in their *Vocational Assessment in Rehabilitation*, also has application to the ADA:

> Functional assessment is the **measurement of purposeful behavior in interaction with the environment**, which is interpreted according to the assessment's intended uses.[4]

This definition emphasizes the **importance of environment and its influence on behavior**, and is not specific to any one setting or purpose. It speaks to the diversity of information often sought through the administration of functional assessment procedures.

Most functional assessment forms are well-suited to identifying those functional aspects associated with "major life activities" (e.g., vision, hearing, memory, endurance, motor speed, perception, learning ability). These forms provide opportunities for rating functioning in a wide range of work and non-work activities using **descriptive appraisals rather than discrete or continuous rating scales** such as "above average/average/below average," or "good/fair/poor." For example, rather than using a Likert-type scale to rate mathematical ability (from a 5 for "above average" to 1 "for below average"), functional statements can be substituted, such as:

5) can use calculus and statistics,

4) can use algebra and geometry,

3) can do basic math with decimals and fractions,

2) can do basic math with whole numbers,

1) can count to 100.

Some forms were designed to be used with a general rehabilitation population,[3] and others were created to assess individuals with severe disabilities.[5] Most inventories must be completed by rehabilitation practitioners, but others can be completed by clients or their family members.[3] **Some companion forms are even designed for use as a functional job analysis inventory to enhance the job accommodation and job match process.[5]** Because these are simply data collection forms, they can be completed during file review, interviewing, observation, testing, vocational evaluation, situational assessment, and staffing processes in a variety of settings (e.g., work, school, home, community, recreation). They do not dictate how information should be collected as long as it is current and accurate.

Functional assessment is not without its problems. There is a **lack of uniformity and standardization among forms, assessment strategies, and recording procedures, resulting in questionable reliability and validity.** However, as long as the process remains systematic, broad-based, and descriptive, it should prove to be a useful tool for the initial development of a functional strengths and limitations profile. The information collected can then be used to develop a plan for evaluating the extent and nature of the identified functional limitations and beneficial accommodations.

Determining Substantial Limitation

The ADA requires that the degree of the functional limitation be established. Only when there is a "**substantial limitation**" will this third and final critical element in the disability definition be met. In the ADA, the term "**substantially limits**" means:

(1) **Unable to perform a major life activity** that the average person in the general population can perform; or

(2) **Significantly restricted** as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[1]

Since "substantially limits" lacks a descriptive or quantifiable definition, professionals will need to rely on guidelines available from other sources. Two terms are important to making the the definition of "substantially limits" operational: "**significantly**" and "**average person in the general population.**"

The phrase "**average person in the general population**" suggests the type of norm group that should be used with tests and work samples. The interpretive section of the Act specifically states that the "**average person is not intended to imply a precise mathematical average**."[1] Therefore, other measurement principles will need to be considered.

"**Significant**," however, is a word that does carry a certain statistical inference. Within the field of standardized testing, **standard deviation** has been used as a tool to interpret, classify, and diagnose; it often represents scores that "significantly" deviate from the "mathematical average" (or mean).

When interpreting the Wechsler Adult Intelligence Scale–Revised, a 15-point (one standard deviation) or greater difference has been used to describe "significant" differences in scores, or scores that are considered diagnostically "significant."[6-9]

An additional use of standard deviation as a classification tool can be found in the *Diagnostic and Statistical Manual of Mental Disorders* (Third Edition-Revised), in which the diagnostic criteria for mental retardation is defined by IQ ranges beginning at the following scores (and standard deviation levels):[10]

Degree of Retardation	Approx. I.Q.	Approx. S.D.
Mild	55–70	–2
Moderate	40–55	–3
Severe	25–40	–4

Although **Borderline Intellectual Functioning** (IQ beginning around 84, –1 S.D.) is covered in this section of the *DSM-IIIR*, it is not considered to be mental retardation.

Specific learning disabilities and neurological impairments have also used standard deviation differences in various test scores as a method of identifying the degree of impairment.[11,12] For example, the *Symbol Digit Modalities Test* of cerebral dysfunction lists standard deviations in the norm table for scoring purposes.[12] The manual states that **Low Scores** fall at approximately **one standard deviation below the mean, Moderately Low Scores** at **one-and-one-half standard deviations below the mean**, and **Very Low Scores** at **two standard deviations below the mean**. Although the author of that test considers scores at –1.5 S.D. for a normal group of adults to be the cutoff score for dysfunction, other research studies cited in the manual feel that scores in the –1 to –1.5 S.D. range "should be considered *suggestive* of cerebral dysfunction."

Using standard deviation as a means of determining the significance of a substantial limitation can be very useful. It also helps to achieve greater accuracy and consistency across groups when employed in conjunction with other assessment strategies (e.g., functional assessment, observation, job analysis).

Applying the standard deviation technique requires close adherence to the following considerations:

1. Care should be taken to choose **tests and work samples that have content similar to the variety of functions associated with major life activities.**
2. Tests and work samples should have **general population and employed-worker norms; disability norms should be avoided** since they may not reflect the general population.
3. **Standard deviation scores, as opposed to mean scores** (50th percentile), should be used as one mechanism for determining which major life activities have significant, substantial limitations.

The following table is a proposed guideline for determining the significance of a substantial limitation.

Determining the Significance of a Limited Function

S.D.	Approx. percentile	Degree of limitation	Goals of Assessment
–1	16th	could be significant	Ascertain function's significance to essential life or work functions. Determine if accommodation is required
–2	2nd	significant	Verify limitation's impact on situation-specific functioning. Explore potential benefits of accommodations
–3	1st	severe	Identify reasonable accommodations and appropriate rehabilitation services to minimize or overcome the limitation

The above guidelines may prove useful except when other recognized federal standards are available. For example, the National Institute of Education, Department of Education, has defined **functional illiteracy** as reading (words and comprehension), arithmetic, and spelling below a 4.9 grade level.[11] This may **serve as a more acceptable guideline when determining substantial limitation in regard to the general population.** On the other hand, **grade levels above 4.9 in some clients may be considered limiting when technical and professional jobs requiring high academic achievement skills are being considered.** Research needs to be conducted on the use of functional assessment forms/inventories, standard deviation cutoffs, and recognized federal guidelines as viable techniques for determining substantial limitations to major life activities.

The ADA also identifies additional factors to be considered when assessing substantial limitations to major life activities. These include:

(1) The nature and severity of the impairment

(2) The duration or expected duration of the impairment

(3)The permanent or long-term impact, or the expected permanent or long-term impact resulting from the impairment.[1]

The standard deviation method could be used to assess "severity of the impairment" along with a content-based comparison of the individual's current functioning to the demands of work and other life activities. The greater the discrepancy, the higher the chances of the impairment being severe. "Duration" of the impairment may best be determined through the diagnostic phase as well as by evaluating the "permanent or long-term impact" of the impairment.

The Major Life Activity of Working

One of the many functions listed under "major life activities" is **working**. The Act states that "with respect to the major life activity of working":

(1) The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. **The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.**

(2) The following factors may be considered in determining whether an individual is substantially limited in the

major life activity of "working":

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of an impairment (broad range of jobs in various classes).[1]

The ability of the rehabilitation professional to conduct a **transferable work skills assessment** will be invaluable in meeting the requirements of this part of the Act.[16] Occupational information resources such as the *Dictionary of Occupational Titles*,[17] the *Revised Classification of Jobs*,[18] and **computerized job search systems**[19] will be essential tools for this phase of the assessment. Since the ADA requires that individuals have reasonable access to jobs within their geographical area, **labor market surveys and job banks representing local employment opportunities should be developed and regularly updated. Knowledge of job families, occupational categories, and job/occupational clusters** provide the working knowledge for determining if a person with a disability can perform the duties of "a class of jobs or a broad range of jobs."

For the disabled individual to be covered under the ADA, **the rehabilitation professional must be able to demonstrate exclusion from a broad range of jobs**.[20] For example, if a worker is unable to perform heavy lifting in a particular job setting (due to the unique arrangement of the work area) but is not restricted in others, this would not constitute a substantial limitation. However, if the worker is restricted from performing all jobs requiring heavy lifting regardless of setting, this would constitute a substantial limitation to that class of jobs.

Employed worker norm groups or predetermined time standards (e.g., MTM, MODAPTS) will need to be used with tests and work samples when determining substantial limitation. Interviewing, functional assessment, job analysis, situational assessment, and the standard deviation technique (as applied to tests and work samples) are useful evaluation tools when examining the major life activities of "working." Thorough knowledge of the labor market will result both in better accuracy in identifying substantial limitations to working and in suggestions for appropriate accommodations.

Assessing the Qualified Individual with a Disability

It is important to understand what is meant by a "qualified individual with a disability". The ADA defines this term as:

> an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.[1]

The noteworthy components of this definition requiring closer examination include: "**reasonable accommodation**" and "**essential functions of such position.**" "Essential functions" means:

the fundamental job duties of the position the individual with a disability holds or desires. The term **"essential functions" does not include the marginal functions of a position**.

A job function may be considered essential for any of several reasons, including but not limited to the following:

(1) The function may be essential because the **reason the position exists is to perform that function**;

(2) The function may be essential because of the **limited number of employees available** among whom the performance of that job function can be distributed; and/or

(3) The function may be **highly specialized** so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Evidence of whether a particular function is essential includes, but is not limited to:

(1) The **employer's judgment** as to which functions are essential;

(2) **Written job descriptions** prepared before advertising or interviewing applicants for the job;

(3) The **amount of time spent on the job performing the function**;

(4) The **consequences of not requiring the incumbent to perform the function**;

(5) The term of a **collective bargaining agreement**;

(6) The **work experience of past incumbents** in the job; and/or

(7) The **current work experience of incumbents** in similar jobs.[1]

Initially, an ADA-based assessment process should be geared to examining the client holistically (i.e., developing an overall individual profile of functional strengths, limitations, and reasonable accommodation options). At that point, ecological issues (i.e., education, work, living, recreation, transportation, or personal/social/family) can be evaluated and environments matched to the individual's holistic profile.

"Essential functions" may only be important to the assessment process when a job match is being considered and when a detailed job analysis is available on the position in question. Assessment specialists involved in job analysis will need to have a thorough understanding of the process for determining essential functions. However, in cases where the evaluator is only responsible for conducting an assessment, other rehabilitation professionals responsible for job analysis will need to be provided with information sufficient to match client abilities with essential functions.

Several factors in the above definition are worth exploring. First, one of the best "litmus tests" of an essential function may be found in the statement, "The consequences of not requiring the incumbent to perform the function...." **If the job cannot be successfully completed by a worker without performing the function, with or without reasonable accommodation, then the function would be considered essential.**

The second important factor relates to phrases such as "reason position exits," "function may be highly specialized," and "amount of time spent on the job performing the function." A **comprehensive job analysis** focuses on four primary criteria: **a description of the duties of the job, an evaluation of the difficulty level of the duties, a consideration of the physical or environmental setting, and a rating of the importance of each duty.**[21]

When considered with other ADA regulations (e.g., amount of time spent performing that function), three criteria stand out as highly useful when analyzing essential job functions:

(1) the most **difficult** task(s)

(2) the most **important** task(s), and

(3) the most **time consuming** task(s).

Counselors and evaluators can provide employers with invaluable assistance on how to determine what job functions are essential as well as methods of incorporating this information into current job descriptions.[22] Rehabilitation professionals must be sensitive to the fact that job descriptions may not always contain current duties and activities, since employers generally concentrate their efforts more on finding ways to improve overall performance rather than on updating descriptions that reflect the new demands.

The second important part of the definition for "qualified individual with a disability" is that of "reasonable accommodation." Under the ADA, "**reasonable accommodation**" means:

(1) **Modifications or adjustments to a job application process** that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(2) **Modifications or adjustments to the work environment**, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(3) **Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment** as are enjoyed by its other similarly situated employees without disabilities.[1]

Vocational assessment plays a very important role in evaluating the three major facets of "reasonable accommodation": job seeking skills, job performance skills, and equal access to employment benefits and privileges. Through the use of information questionnaires and interviews (such as sample job application forms), the specialist can determine if the client, with or without modifications or adjustments, can successfully apply and interview for a job. Holistic and ecological assessments can be used to evaluate the performance and environmental aspects of the job and the need for accommodations.

In light of this new legislation, **rehabilitation professionals need to develop techniques for evaluating modifications needed by a client to access equal benefits and privileges of employment** (e.g., full plant access, health insurance, recreation and leisure, educational opportunities). More generalized assessment strategies such as file review and interviewing can be used here until more valid procedures are available. In addition, the publication *Employability Assessment and Planning in Rehabilitation and Educational Settings*[23] describes three work-related competencies (choosing a job, getting a job, keeping a job) that provide suggestions for evaluating the job application process and how the position is customarily performed.

With regard to actual job modifications for specific work tasks, "reasonable accommodation" may include:

(1) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;

(2) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment

> or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.[1]

By no means is this an exhaustive list, and it should be used to stimulate exploration into other types of accommodations. **Rehabilitation engineering and assistive technology resources** should be accessed on a case-by-case basis to help choose appropriate accommodations. It is important that potential accommodations be detailed in the vocational evaluation report so that all contingencies for successful placement can be included in the rehabilitation and placement plan.

Given the almost daily advances in assistive technology, most counselors and evaluators will be hard-pressed to stay abreast of new developments. However, by **establishing close working relationships with local rehabilitation engineers and learning to use national assistive technology data bases** such as the Job Accommodation Network (JAN, phone 1-800-526-7234), counselors and evaluators can gain greater insight in how best to solve accommodation problems. A unique aspect of vocational evaluation is the ability to try out modifications, similar to those noted above, to determine how they effect performance. This serves as an opportunity to **explore and identify accommodations that prove beneficial in evaluation and, therefore, may prove equally beneficial in the classroom or job site**.

The ADA does not place all of the burden on the employer to determine which accommodation(s) would work best. It spells out a process whereby an **employer can discuss accommodation needs with the prospective employee**. The regulations state:

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. The process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[1]

Throughout the assessment process, the specialist must routinely share results with clients and determine if they possess sufficient decision-making skills to understand and verbalize the results clearly. Only when we enlighten and empower our clients with assessment information can they become fully participating members of the rehabilitation team and independent job seekers.

One of the most beneficial skills we can **teach our clients is how to explain to employers how they would go about performing specific job tasks and what reasonable accommodations would prove beneficial to ensuring competitive employment**. Clients who are able to articulate approaches to—and accommodations for—specific work tasks will not require as much assistance in the placement process as individuals who are unable to understand or explain their employment strengths and needs. In that situation, someone would need to be empowered to speak on behalf of the client.

This process of empowerment involves sharing functional strengths and limitations profiles with clients, and discussing their understanding of and agreement with their profiles. As accommodations are explored, clients can be asked if they know of beneficial modifications that can also be tried. All too often, rehabilitation practitioners make decisions concerning clients without really asking how they feel or what they can do.

Accommodations of essential functions may go beyond the need to improve performance; some focus on the necessity to minimize dangers at the job site. The ADA refers to this as "**direct threat**" which is defined as:

> **a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.** The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a **reasonable medical judgment** that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:
>
> (1) The duration of the risk;
>
> (2) The nature and severity of the potential harm;
>
> (3) The likelihood that the potential harm will occur;
>
> (4) The imminence of the potential harm.[1]

Knowledge of the job will improve the ability accurately to target appropriate accommodations that will reduce or eliminate the specific threat and allow the worker to "safely perform the essential functions of the job." Without a detailed job and environmental analysis that includes potential job risks, the assessment can only make inferences about direct threat issues based on the known disability.

Proper Selection and Use of Evaluation Instruments

The ADA provides very specific **guidelines for the identification and use of standardized instruments for employment screening purposes**. These guidelines should be uniformly applied in any appropriately administered evaluation. The first test-related regulation, "Qualification standards, tests, and other selection criteria," reads as follows:

> It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.[1]

Counselors and evaluators should **avoid using instruments and techniques that serve to screen clients out of jobs and services**. Good evaluation practice is consistent with ADA regulations in that modifications and accommodations are routinely applied throughout the process and described in the evaluation report. Instruments should be chosen that have job-related content and appropriate norm groups so that both criterion-referenced and norm-referenced techniques can be incorporated into the interpretive process.[13]

An additional regulation governing the administration of tests reads as follows:

> It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the **test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of**

such employee or applicant (except where such skills are the factors that the test purports to measure).[1]

This complex regulation emphasizes a point that should be of utmost concern to anyone using standardized instruments with rehabilitation clients. In short, it stresses the **need carefully to choose and use tests and work samples that evaluate people's abilities rather than their disabilities.** We must ensure that instruments are used and modified so that the outcomes are not influenced significantly by a disability. It is important to remember that as tests are modified, their standardization is compromised—any reliance on norms should be supplemented with other information resources (e.g., criterion-referenced interpretations, file review, interviews, use of other tests and work samples, situational assessment, occupational information).

Content of an ADA-Based Vocational Evaluation Report

In cases where evaluation and assessment reports are required, the writer may want to ensure that information pertinent under the ADA is systematically presented. **Narrative reports can be sub-headed to reflect ADA content** (e.g., Functional Strengths, Functional Limitations, Accommodations, Environmental Issues, Planning and Placement Contingencies, Recommendations). At a minimum, content within the various sub-headings should cover the following points:

1. A **review of the functional strengths and limitations** as they relate to various transitional/ environmental settings and situations (e.g., transportation, home, community, work, activities of daily living, consumer skills).
2. A discussion of **how tests, work samples, and other assessment techniques were modified** and their impact on performance.
3. An **assessment of the client's ability to relate functional strengths and limitations to job tasks and to discuss appropriate accommodations** for specific tasks with an employer.
4. A **review of reasonable accommodation options and rehabilitation services** that could be offered to overcome identified limitations related to placement recommendations.

Prior to writing a report, a review of the above points through a meeting with the client, referral source, and significant others would help refine recommendations, ensure consensus, and provide continuity in service delivery.[24]

Conclusion

The key to a successful ADA-based vocational evaluation or assessment is the **accurate identification of functional strengths and limitations**, and the **determination of reasonable accommodations that can minimize or eliminate the identified limitations**. At times, the evaluation and assessment process has been criticized for doing little more than identifying limitations used to screen people out of services. The ADA still requires a focus on targeting limitations, but with the specific purpose of overcoming (accommodating) barriers to employment—the primary goal of the evaluation process.

Evaluators are not restricted by ADA guidelines when reviewing files, administering information questionnaires, or conducting interviews with clients, so that detailed information can be collected and used to formulate plans and recommendations that help clients function better. However, the administration of standardized instruments should abide by the specific testing regulations of the ADA in order to maintain validity and eliminate adverse impact.

On the other hand, the creative and flexible use of work samples and situational assessment activities will permit the exploration of better ways to accommodate and match rehabilitation clients to various living and working environments. By their very nature, accommodations confound issues of standardization, and in these situations the psychometric properties of tests must give way to the diverse and unique needs of the person being evaluated. A balanced application of norm-referenced and criterion-referenced assessment strategies will result in a more holistic evaluation that truly reflects an individual's current functioning and future potential. Not only will the requirements of the ADA be met, but the opportunities for full integration of persons with disabilities into society will be realized.

RESOURCES

Catalogs are available from the following organizations that contain publications on: functional assessment instruments, reviews of standardized tests and work sample systems, occupational resource materials and software, and vocational evaluation and assessment procedures.

Arkansas Research & Training Center
in Vocational Rehabilitation
Publications Department
P.O. Box 1358
Hot Springs, Arkansas 71902
(501) 624-4411, Ext. 316

Elliot & Fitzpatrick
P.O. Box 1945
Athens, Georgia 30603
(404) 548-8161

JIST Works, Inc.
720 North Park Avenue
Indianapolis, Indiana 46202-3431
(800) 648-5478

Materials Development Center
Stout Vocational Rehabilitation Institute
University of Wisconsin - Stout
Menomonie, Wisconsin 54751
(715) 232-1342

Research and Training Center
Stout Vocational Rehabilitation Institute
University of Wisconsin - Stout
Menomonie, Wisconsin 54751
(715) 232-1380

Virginia Commonwealth University
Rehabilitation Research and Training
Center
VCU Box 2011
Richmond, Virginia 23284-0001
Attn: Resource Dissemination
(804) 257-1851

West Virginia Research and Training
Center
One Dunbar Plaza, Suite E
Dunbar, West Virginia 25064-3209
(304) 766-7138

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QUESTIONS BASED ON THIS LESSON

17. Vocational assessment

A. is a formal procedure that uses techniques such as file review and interviewing

B. is an informal procedure that uses techniques such as file review and interviewing

C. is a formal procedure that incorporates more comprehensive testing and work sample administration

D. is the opposite of vocational evaluation

18. Which of the following statements is true?

A. A lack of uniformity among forms, assessment strategies, and recording procedures can be a problem when performing functional assessments.

B. Functional assessment measures performance after the job is acquired

C. The environment has no influence on behavior.

D. A functional job analysis inventory may jeopardize the job accommodation and job match process.

19. Standard deviation

A. can be used in determining the degree of impairment of different functions

B. has been proven to be useless in determining the significance of I.Q. scores

C. should never be employed in conjunction with other assessment strategies for fear of promoting a lack of unity

D. should utilize disability norms because disabled workers are different from the general population

20. Which of the following should *not* be part of a comprehensive job analysis?

A. A description of the duties of the job

B. An evaluation of the difficulty level of the duties

C. A rating of the importance of each duty

D. None of the above

LESSON 5

ADA and STATE/FEDERAL REHABILITATION: A DAWN of CHANGE

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Key Points

- The Texas Rehabilitation Commission (TRC) developed *ADA-Texas* to build an *entrepreneurial activity* that could *introduce ADA training* to the rehabilitation staff in Texas.

- ADA-Texas elected also to invite to these training sessions *private-sector employers* having long-standing relationships with the TRC and charge those attendees a training fee. Also invited without cost were *clients* and *client advocates*.

- The *employer trainees* themselves began to become *corporate and private trainers* in the provisions of the ADA. This quickly brought additional requests from the private sector to ADA-Texas to provide additional training—this ultimately made ADA-Texas financially self-supporting. However, the effects of training *TRC employees* to become trainers of the other TRC staff unfortunately had less than the desired effect.

- The TRC also created a task force to examine how well it was *internally implementing ADA provisions*. Ultimately, this resulted in a diagnosis that even the TRC, whose proactive programs were well ahead of other state systems, was *not prepared fully to implement ADA requirements* by January 26, 1992.

- With the source of funds gradually becoming the *private-sector employer*, the employer will become a *customer of rehabilitation* and will demand and deserve satisfaction. The new vision includes a strong partnership between business and committed rehabilitation professionals.

- State rehabilitation professionals accustomed to operating under one set of strict federal guidelines when funding was primarily furnished on the federal level must *adapt to a new set of rules* for funding that is provided mainly by private employers.

History and Introduction

Until the introduction of the Americans with Disabilities Act in 1990, the state/federal rehabilitation system of funding and service provision remained basically unchanged since the enactment of the Vocational Rehabilitation Act in 1929. The basic model of rehabilitation generally included the following sequence of events:

1) Injury, illness or genetics produces a disability;
2) Await recovery of the client in order to determine the permanent effects of the disability;
3) Determine through medical and/or alternative evaluation the resulting vocational handicap;
4) Provide restoration and/or training to minimize the effect of the handicap or to retool the individual to assume another vocation; and
5) Locate appropriate employment in sheltered or competitive environment.

In order to receive federal funding for the services they provide, state rehabilitation agencies that receive matching funds from the Rehabilitation Service Administration are required to adhere strictly to federal guidelines when processing the rehabilitation needs of the individuals under their jurisdiction.

The state rehabilitation agency's basic agenda was altered slightly in the 1940s to accommodate select psychiatric disabilities. Efforts to include the "social disabilities" in the late '60s and the subsequent withdrawal of that effort in the early '70s also helped to alter the complement of disabilities represented in the program, but these complexion changes did little to alter the general structure. In the last 20 years, the emergence of other programs also has slightly shifted the program emphasis; the Comprehensive Employment and Training Act, welfare reform, criminal justice grant activity, and the adjustments in the Social Security funding that have occurred over the years have all had impact on the rehabilitation system.

For state rehabilitation programs, the opportunity to embrace changes in the typical model arose more than 20 years ago with the passage of **Section 504 of the Rehabilitation Act of 1973. For most of the country, Sec. 504 was a "toothless tiger" that did little to alter the course of rehabilitation services.** Some rehabilitation programs designated a 504 coordinator in accordance with the law, but most programs did not develop procedures for handling 504 complaints because such activity was virtually nonexistent. **Few real advocacy programs endeavored to represent clients against the 504-covered employer, because such representation might have negatively affected the funding of the program and the relationship that existed between the rehab program and the prospective employer.** For the most part, therefore, 504 produced few alterations to the status quo of the historical model.

The passage of the Americans with Disabilities Act on July 26, 1990 and the subsequent passage of the Civil Rights Act of 1991 have introduced a significant mandate to the world of rehabilitation. State rehabilitation professionals accustomed to operating under one set of strict federal guidelines when funding was primarily furnished on the federal level must adapt to a new set of rules for funding that is provided mainly by private employers. Rehabilitation establishments in existence for over six decades now face either major opportunities or massive threats, depending on how the initiatives of the ADA are viewed.

ADA-Texas

The Texas Rehabilitation Commission (TRC) recognized the challenge—and, to some degree, the opportunities—introduced by the ADA. **In November of 1990, the TRC launched a proactive program that came to**

be nationally known as ADA-Texas. ADA-Texas was a vision evolved by the Deputy Commissioner of Special Programs, with the **goal of building an entrepreneurial activity that could introduce ADA training to the rehabilitation staff in Texas.**

The ADA-Texas team was composed of three full-time select volunteers from within the Texas Rehabilitation Commission staff. They were borrowed from existing positions and assured the right to return to their former assignments upon completion of the 2-year effort if they desired to do so.

TRAINING GOALS:

The primary goal for the team was to develop the training material and a method of delivery to the 2400 staff members of the TRC who were unfamiliar with the provisions of the new law or of Section 504. Because the staff of the Commission perceived that the TRC itself would logically be viewed as a resource in implementing the ADA in Texas, the training would be critical to those rehabilitationists who were likely to be called upon as experts.

Counselors and administrative personnel needed to be capable of both technical assistance and basic advocacy for clients in light of the ADA. To this end, ADA-Texas planned a **'train the trainer' program, which would also allow TRC staff to be able to communicate this new information to their colleagues throughout the Commission.** This planning included the development of a training manual which addressed all Titles of the ADA law through eight modules: 1) Overview, 2) Employment Issues, 3) Reasonable Accommodation,4) Understanding the Law, 5) Practical Steps for ADA Implementation, 6) Attitudes, 7) Workers' Compensation, and 8) Essential Job Functions.

The training program encompassed 3 days of participative activities that were designed to give the selected participants first-hand knowledge of the material, and also served as a guide for participants who would subsequently be applying this information and supervising other TRC staff. The trainer's manual consisted of all needed transparencies for a full trainer's exercise; trainees' workbooks followed these modules. Additionally, audiotapes provided refreshers for the trainers and added some details to the actual training modules.

The goal of this approach was to provide a primary and a back-up trainer for about 75 supervisory units in the state of Texas and then have those trainers provide the training to every employee in the unit. This method would ultimately reach every counselor, secretary, and administrative person in the rehabilitation program.

To make the training exercises more real, **we elected also to invite to this training program employers having long-standing relationships with the rehabilitation program and charge those attendees a training fee.** Those fees were used as stipends also to invite, without cost, clients and/or client advocates. The composition of each training activity was then divided into thirds—**staff, employers, and clients/advocates.** We discovered that using this combination proved to be the most electrifying part of the training. **The mixture of views, positions, attitudes, and feelings allowed for the expansion of understanding not possible in the singular context of any one of the groups by themselves.**

In fact, an unplanned by-product of the external invitations rapidly began to evolve. Using the materials provided to them at the training sessions, **the employer trainees began themselves to become corporate and private trainers.** This expanded the base of training to an audience that we had not anticipated and began to bring requests from other employers and vendors that rapidly strained our capacity even to answer the telephone calls. The requests ranged from desiring to send personnel to the next training exercise, to requests for our training staff to come into corporate locations and conduct special activities for the companies' personnel, to requests for materials and reproductions of the materials given to the participants.

Thus, the goal of making ADA-Texas financially self-supporting quickly became feasible. Many of the trainers from the "outside" world moved very quickly into trainer functions in their respective companies or became involved in private training activities. Some of these ADA-Texas-trained people have been very successful in their private activities and have made significant contributions to the expansion of understanding about the requirements of the law. **Many of the employers that paid for their trainers to attend have developed outstanding ADA programs to benefit both the employees and the competitive position of their respective companies.** One of the first classes was comprised of representatives of Southwest Airlines, USAA Insurance, the City of San Antonio, and a number of other major employers in Texas. The effects of the participation of these influential people and the ongoing networking that developed in the trainer activities can have incalculable benefits for the rehabilitation program.

However, the effects of training TRC employees to become trainers themselves unfortunately had less than the desired effect. It seems that not all of the managers understood that these people would be returning with an expectation to pass that training on to other people in the units. Thus, **in many of the units, no subsequent training has been carried out by the participants.**

Also, there seemed to be a total **failure on the part of some management to understand that the goals of the ADA and rehabilitation are not mutually exclusive.** Some managers observed that they had to follow an unwritten "informal message" that their staff did not have the time to do both rehabilitation and implement the ADA and that rehabilitation took precedence. **The end result of the training effort was that only some of the TRC staff received the skills that would allow them to provide the guidance that would be requested of them.**

ADA-TEXAS SELF-EXAMINATION:

Soon after the training activities had been initiated, **a task force was created to examine how well the TRC was itself implementing ADA provisions.** This body of people was charged with examining every aspect of the Commission's business and making policy decisions about the direction of the commission in regard to matters relating to the ADA. Seventeen distinct policy statements resulted. These decisions are typical of what one would expect a task force to develop—lofty, philosophical, "correct" decisions that were great until the time came to implement them.

Take, for example, the **decision that all offices of the Commission would be barrier-free by January 26, 1992.** This hypothetical decision was easily made; however, it **proved to be impossible to implement by the date identified—it has, in fact, not been carried out as of this writing.** By the deadline, the General Services Commission (the state agency responsible in Texas for all lease acquisitions) would have had to abandon all leases that failed to meet the standards required by ADA. However, the state was unable to have all 160 TRC locations surveyed by competent surveyors by that time. Instead, a sign was posted in front of the entrances of all TRC offices noting the intention to provide services in whatever alternative ways were necessary to meet the needs of anyone with a disability; a phone number and personal contact were provided. This sign was displayed at all offices, even though over 90% were known to be essentially in compliance with ADA requirements.

Another decision stated that **all vendors providing services to clients of the commission would be notified that they must be in compliance with the requirements of the ADA.** This notification was completed during February and March of 1992; over 90,000 notices were mailed to physicians, schools, halfway houses, hospitals, and every other type of provider on the computer database. This proved to be one of the more controversial of the actions taken. The controversy raged between the programs (service provider) and the legal and the administrative sections that were attempting to carry out the ADA decision. The program section wanted no interference that might adversely affect the numbers served. **Some of the vendors were unwilling or unready to make major adjustments to their business practices.**

The threat of cessation of business was more the issue than the actual cessation. The official wording of the notice read that business would cease after the vendor had been found guilty in court of noncompliance with ADA provisions. However, because it was well-known that the EEOC and the Justice Department were years away from actual indictments, this empty threat was unlikely to interrupt business as usual.

How much involvement were the field counselors to have in the role of implementing the ADA in the cases where obvious violations were occurring? At the present time, the prevalent attitude of the responsible programs managers seems to be to continue to do business as usual. That is, **many feel it is difficult enough simply to have the clients placed in a job without antagonizing the prospective employers by insisting that they immediately comply with ADA requirements. Thus, the advocacy process is at present being accomplished only by a few "crusading" counselors.** Those crusaders are probably not great favorites with their peers, since their crusading for the ADA may be making it difficult to retain prospective employers. They are also, in many cases, not on the most favored list of their managers because of their "anti-establishment behavior."

As we become more aware of the expressed needs of people with disabilities, we as a rehabilitation community will begin to understand that **advocacy is not anti-establishment behavior but indeed what the establishment behavior should hold as an ideal.** Employers will begin to realize that the counselors' advocacy will bring resources not presently available to the employment setting, thus becoming an asset to their productivity.

The entire issue of advocacy in behalf of the client seems to be a taboo topic if it in any way upsets the status quo. What is a counselor to do if the employer of numerous clients attempts to exclude persons with certain disabilities? **The counselor knows that if the advocacy role is played out to the ideal, it may well cost future placements.** Prejudice against people with disabilities is a difficult position for those who represent that particular population. In many cases, many of the rehabilitation specialists themselves are disabled and feel an even greater obligation for responsible client advocacy. How then is the rehabilitation representative to handle this situation officially?

These are but a few of the dilemmas that grew out of the task force's identification process. Official positions were developed with some degree of frustration and posturing. **The real challenge proved to be in communicating the official decisions when informal policy consistently undermined the formal.** In other words, the real test became "are we willing to walk what we talk?"

Ultimately, our self-evaluation resulted in a diagnosis that **the TRC was *not* prepared fully to implement**

ADA requirements on January 26, 1992. Even though we had attempted to identify the needs so early and the nationally-recognized training activity was launched well before other entities had even begun to attend to the issues, our program was still far from fully operative.

Although in the short term there are individuals who cannot see the opportunity for rehabilitation in the ADA regulations and who treat the policy statements of the TRC as merely "lip service," in the long term, the policies will put the Commission in a very advantageous position. The actions of the task force were very thorough and deliberate, carefully basing all objectives on the requirements of the law.

To illustrate this issue, consider one of the policy decisions: the Texas Rehabilitation Commission would institute a return to work program for all worker compensation employees. The details of the policy statement went on to note the need also to include in this program any employee who needed job accommodation, regardless of the source of injury or illness. At this time, programs are being developed to carry out this policy, but the zest to pursue it is not alive. The real sense of organizational commitment is not present, and the perception of need for these future employees by the workforce is not yet evident. However, the continuing decrease of competent individuals entering the workforce will gradually increase the market for competent applicants, and these trained individuals will have an important competitive advantage. When that time comes, both the policy statement and the procedures that have been put together will be applauded.

The cry for technical assistance, presently being considered a threat, will become recognized as the grand opportunity it is for the rehabilitation world. Our experience with private-sector-sponsored trainees at our ADA workshops indicates that they are willing to spend their money for accommodations, so **employer money will become tomorrow's fresh funds that the federal and state sources will be unable to provide. ADA-Texas has proved that rehabilitation can indeed foster a new era of partnership between the employer, the person with a disability, and the rehabilitation professional.**

Our traditional model will, of course, have to be altered. **With the source of funds gradually becoming the private-sector employer, the employer will become a customer of rehabilitation and will demand and deserve satisfaction.** Services will need to be professional and result in benefit to the employer, and rules that have governed the program for more than 60 years will have to be rewritten to satisfy these new needs. The old model may continue, but for an increasingly different population with a diminished expectation of productivity.

A Vision for the Future

ADA implementation in public-sector rehabilitation agencies is going to take time, patience, and tenacity. Many rehabilitation professionals have been brought up in the same environment and possess some of the same prejudices that the ADA law is attempting to change, and we may be just as resistant to this change as the rest of society. Examining ourselves critically and honestly, we can see the long-term effect of this massive social change as one of the most creative, innovative, and productive opportunities we have ever experienced.

This change may be the dawn of opportunity for a very large percentage of our population that is growing older—with aging comes an increased exposure to disability. At the same time, the number of younger supporters is growing smaller; they are increasingly burdened by the needs of the burgeoning elder population. That imbalance is going to demand a forward-looking rehabilitation process to maintain a productive population of elders with disabilities.

That new vision includes a strong partnership between business and an array of rehabilitation professionals who know that client advocacy means more than enrolling every client in a job readiness class for 6 weeks and closing the case within 60 days. **Those rehabilitation professionals will be specialists in job analysis, ergonomic engineering, and job adaptation methods.** They will also be mediators capable of resolving differences in ways that satisfy the greater need while addressing the diverse interests represented.

The 2-year experiment of ADA-Texas is drawing to a close. The special unit is being disassembled, and ADA activities are being integrated into the everyday activity of the organization. Title I activities will be principally the responsibility of the Human Resources Department; Title II will be the province of the Programs delivery; grievances will go to to the Civil Rights Office; and Title III to the Lease Administration group. Title IV will be shared among the departments. We will fulfill the ADA differently because of ADA-Texas.

ADA-Texas was a great success in that we proved that the unit could generate enough revenue to be financially self-sufficient. We also believe our pioneering experience will prove invaluable to other public- and private-sector rehabilitation agencies as they seek the best ways to implement the ADA. We hope our identification of some of the major obstacles to implementing ADA provisions will lead to increased creative problem-solving that will benefit both client and employer.

The Americans with Disabilities Act has prompted a great paradigm shift for state and federal rehabilitation programs. To be in the midst of such change and understand its potential is particularly difficult for those who need to convince those in political control of the system. Many years ago a leader in the world of developing resources for people with cerebral palsy said, "It is necessary to maintain a happy dissatisfaction with ourselves." As we rehabilitation professionals integrate the ADA into our everyday professional tool kit, we too must maintain a happy dissatisfaction with ourselves, and manage the short-term frustrations with an eye on the long-term goals.

About the Author

John Fenoglio, M.A., L.P.C., was the Deputy Commissioner for Special Operations of the Texas Rehabilitation Commission in Austin, Texas. He directed the activity of the ADA-Texas team and the nationally-recognized efforts of that activity. Currently, he is the Advisor on Total Management in the Management Development Center for the State of Texas.

QUESTIONS BASED ON THIS LESSON

21. Which of the following was *not* a goal of ADA-Texas?

A. To introduce ADA provisions to the rehabilitation staff in Texas

B. To introduce ADA provisions to private-sector employees in Texas

C. To sever ties with the federal funding system

D. To become financially self-sufficient

22. Which of the following was *not* a result of the training program?

A. Private-sector trainees began to become corporate and private trainers in ADA provisions

B. Within the TRC, the learning was quickly passed down to all 2400 TRC employees

C. Funds from the private sector made ADA-Texas self-supporting

D. The "electrifying" mixture of ideas enabled TRC employees, clients, client advocates, and private-sector employees to come to a heightened understanding of the ADA

23. Which of the following is a difficulty encountered by ADA-Texas in adjusting to the requirements of the ADA?

A. State rehabilitation professionals accustomed to operating under one set of strict federal guidelines when funding was primarily furnished on the federal level had to adapt to a new set of rules for funding that is provided mainly by private employees

B. Lack of communication between managers resulted in the training not being passed down through the ranks of the TRC staff

C. Many rehabilitation professionals feel that insisting that prospective employers comply strictly with ADA requirements will antagonize employers and cost future placements

D. All of the above

24. The TRC's self-evaluation indicated that

A. Texas was far behind most other states in responding to the ADA

B. it was easy to get their vendors to comply immediately with the ADA

C. there is a high level of enthusiasm for the TRC's proposed return to work program

D. the TRC was not prepared fully to implement ADA requirements on January 26, 1992

THE
AMERICANS with DISABILITIES ACT

Title 42, United States Code

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The Americans With Disabilities Act

Title 42, United States Code

Chapter 126—Equal Opportunity for Individuals with Disabilities

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§ 12101. Findings and purposes

(a) **Findings.** The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) **Purpose.** It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) **Auxiliary aids and services.** The term "auxiliary aids and services" includes—

  (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

  (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

  (C) acquisition or modification of equipment or devices; and

  (D) other similar services and actions.

(2) **Disability.** The term "disability" means, with respect to an individual—

  (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

  (B) a record of such an impairment; or

  (C) being regarded as having such an impairment.

(3) **State.** The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I—EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(1) **Commission.** The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) **Covered entity.** The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) **Direct threat.** The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) **Employee.** The term "employee" means an individual employed by an employer.

(5) **Employer.**

(A) **In general.** The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) **Exceptions.** The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) **Illegal use of drugs.**

(A) **In general.** The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law.

(B) **Drugs.** The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(7) **Person, etc.** The terms "person," "labor organization," "employment agency," "commerce," and "industry affecting commerce," shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) **Reasonable accommodation.** The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructing, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) **Undue hardship.**

(A) **In general.** The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) **Factors to be considered.** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) **General rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction.** As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this

subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) **Employment entrance examination.** A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) **Examination and inquiry.**

(A) **Prohibited examinations and inquiries.** A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) **Acceptable examinations and inquiries.** A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) **Requirement.** Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defenses

(a) **In general.** It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consisted with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) **Qualification standards.** The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) **Religious entities.**

(1) **In general.** This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) **Religious tenets requirement.** Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) **List of infectious and communicable diseases.**

(1) **In general.** The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) **Applications.** In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) **Construction.** Nothing in this chapter shall be construed to pre-empt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handing which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

§ 12214. Illegal use of drugs and alcohol

(a) **Qualified individual with a disability.** For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) **Rules of construction.** Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) **Authority of covered entity.** A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing.

(1) In general. For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction. Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) **Transportation employees.** Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

§ 12117. Enforcement

(a) **Powers, remedies, and procedures.** The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000-e8, and 2000e-9) shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) **Coordination.** The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 e seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

SUBCHAPTER II—PUBLIC SERVICES

DIVISION A—PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICAPLE PROVISIONS

§ 12131. Definition

As used in this subchapter:

(1) **Public entity.** The term "public entity" means—

- (A) any State or local government;
- (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act [45 U.S.C. 502(8)]).

(2) **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) **In general.** Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this division. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) **Relationship to other regulations.** Except for "program accessibility," "existing facilities," and "communications," regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). With respect to "program accessibility, existing facilities," and "communications," such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) **Standards.** Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this division, other than facilities, stations, rail passenger cars, and vehicles covered by division B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

DIVISION B—ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY

Part I—Public Transportation Other Than by Aircraft or Certain Rail Operations

§ 12141. Definitions

As used in this part:

(1) **Demand responsive system.** The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) **Designated public transportation.** The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) **Fixed route system.** The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) **Operates.** The term "operates," as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) **Public school transportation.** The term "public school transportation" means transportation by schoolbus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) **Secretary.** The term "Secretary" means the Secretary of Transportation.

§ 12142. Public entities operating fixed route systems

(a) **Purchase and lease of new vehicles.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following July 26, 1990 and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) **Purchase and lease of used vehicles.** Subject to subsection (c)(1) of this section, it shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system to purchase or lease, after the 30th day following July 26, 1990, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) **Remanufactured vehicles.**

(1) **General rule.** Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following July 26, 1990; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) **Exception for historic vehicles.**

(A) **General rule.** If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usably by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) **Vehicles of historic character defined by regulations.** For purposes of this paragraph and section 12148(b) of this title, a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

§ 12143. Paratransit as a complement to fixed route service

(a) **General rule.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) **Issuance of regulations.** Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

(c) **Required contents of regulations.**

(1) **Eligible recipients of service.** The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section—

(A) (i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) **Service area.** The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) **Service criteria.** Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) **Undue financial burden limitation.** The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) **Additional services.** The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) **Public participation.** The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) **Plans.** The regulations issued under this section shall require that each public entity which operates a fixed route system—

(A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) **Provision of services by others.** The regulations issued under this section shall—

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) **Other provisions.** The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) **Review of plan.**

(1) **General rule.** The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) **Disapproval.** If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) **Modification of disapproved plan.** Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secretary, and commence implementation of, such modified plan.

(e) **Discrimination defined.** As used in subsection (a) of this section, the term "discrimination" includes—

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section;

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3) of this section;

(3) submission to the Secretary of a modified plan under subsection (d)(3) of this section which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) **Statutory construction.** Nothing in this section shall be construed as preventing a public entity—

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

§ 12144. Public entity operating a demand responsive system

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following July 26, 1990, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

§ 12145. Temporary relief where lifts are unavailable

(a) Granting. With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 12142(a) or 12144 of this title to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) Duration and notice to Congress. Any relief granted under subsection (a) of this section shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) Fraudulent application. If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) of this section was fraudulently applied for, the Secretary shall—

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

§ 12146. New facilities.

For purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

§ 12147. Alterations of existing facilities

(a) **General rule.** With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations.

(1) General rule. For purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheel chairs.

(2) Rapid rail and light rail key stations.

(A) **Accessibility.** Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on the July 26, 1990.

(B) **Extension for extraordinarily expensive structural changes.** The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following July 26, 1990 at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) **Plans and milestones.** The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection—

(A) that reflects consultation with individuals with disabilities affect by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

§ 12148. Public transportation programs and activities in existing facilities and one car per train rule

(a) Public transportation programs and activities in existing facilities.

(1) **In general.** With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) **Exception.** Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 12147(a) of this title (relating to alterations) or section 12147(b) of this title (relating to key stations).

(3) **Utilization.** Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) One car per train rule.

(1) **General rule.** Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system, for the purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C 794), it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) **Historic trains.** In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the

National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 12142(c)(1) of this title and which do not significantly alter the historic character of such vehicle.

§ 12149. Regulations

(a) **In general.** Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this part (other than section 12143 of this title).

(b) **Standards.** The regulations issued under this section and section 12143 of this title shall include standards applicable to facilities and vehicles covered by this division. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

§ 12150. Interim accessibility requirements

If final regulations have not been issued pursuant to section 12149 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 12146 and 12147 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minium guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

Part II—Public Transportation by Intercity and Commuter Rail

§ 12161. Definitions as used in this part:

(1) **Commuter authority.** The term "commuter authority" has the meaning given such term in section 103(8) of the Rail Passenger Service Act (45 U.S.C. 502(8)).

(2) **Commuter rail transportation.** The term "commuter rail transportation" has the meaning given the term "commuter service" in section 103(9) of the Rail Passenger Service Act (45 U.S.C. 502(9)).

(3) **Intercity rail transportation.** The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) **Rail passenger car.** The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single-level and bi-level sleeping cars, single-

level and bi-level lounge cars, and food service cars.

(5) **Responsible person.** The term "responsible person" means—

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) **Station.** The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

§ 12162. Intercity and commuter rail actions considered discriminatory

(a) Intercity rail transportation.

(1) **One car per train rule.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) **New intercity cars.**

(A) **General rule.** Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) **Special rule for single-level passenger coaches for individuals who use wheelchairs.** Single-level passenger coaches shall be required to—

- (i) be able to be entered by an individual who uses a wheelchair;
- (ii) have space to park and secure a wheelchair;
- (iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and
- (iv) have a restroom usable by an individual who uses a wheelchair, only to the extent provided in paragraph (3).

(C) Special rule for single-level dining cars for individuals who use wheelchairs. Single-level dining cars shall not be required to—

- (i) be able to be entered from the station platform by an individual who uses a wheelchair; or
- (ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) Special rule for bi-level dining cars for individuals who use wheelchairs. Bi-level dining cars shall not be required to—

- (i) be able to be entered by an individual who uses a wheelchair;
- (ii) have space to park and secure a wheelchair.
- (iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or
- (iv) have a restroom usable by an individual who uses a wheelchair.

(3) Accessibility of single-level coaches.

(A) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches—

- (i) a number of spaces—
  - (I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and
  - (II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train.

  as soon as practicable, but in no event later than 5 years after July 26, 1990; and
- (ii) a number of spaces—
  - (I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their

wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 10 years after July 26, 1990.

(B) **Location.** Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) **Limitation.** Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) **Other accessibility features.** Single-level passenger coaches and food service cars on which the spaces required by subparagraph (A) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to be entered from the station platform by an individual who uses a wheelchair.

(4) **Food Service.**

(A) **Single-level dining cars.** On any train in which a single-level dining car is used to provide food service—

(i) if such single-level dining car was purchased after July 26, 1990, table service in such car shall be provided to a passenger who uses a wheelchair if—

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (i) through which an individual who uses a wheelchair may enter.

(B) **Bi-level dining cars.** On any train in which a bi-level dining car is used to provide food service—

(i) if such train includes a bi-level lounge car purchased after July 26, 1990, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, should be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) **Commuter rail transportation**

(1) **One car per train rule.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) **New commuter rail cars.**

(A) **General rule.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after the effective date of this section, unless all such cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) **Accessibility.** For purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require—

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) **Used rail cars.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 749) for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(d) **Remanufactured rail cars.**

(1) **Remanufacturing.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to remanufacture a rail passenger car for use in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) **Purchase or lease.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) **Stations.**

(1) **New stations.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) **Existing stations.**

(A) **Failure to make readily accessible.**

(i) **General rule.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(ii) **Period for compliance.**

(I) **Intercity rail.** All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after July 26, 1990.

(II) **Commuter rail.** Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after July 26, 1990, except that the time limit may be extended by the Secretary of Transportation up to 20 years after July 26, 1990 in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) **Designation of key stations.** Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) **Plans and milestones.** the Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) **Requirement when making alterations.**

(i) **General rule.** It shall be considered discrimination, for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) **Alterations to a primary function area.** It shall be considered discrimination, for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) **Required cooperation.** It shall be considered discrimination for purposes of section 12132 of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for an owner, or person in control, of a station governed by subparagraph (A) or (B) to fail to provide reasonable cooperation to a responsible person with respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter.

§ 12163. Conformance of accessibility standards

Accessibility standards included in regulations issued under this part shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 12204(a) of this title.

§ 12164. Regulations

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this part.

§ 12165. Interim accessibility requirements

(a) **Stations.** If final regulations have not been issued pursuant to section 12164 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under that section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities as required under section 12162(e) of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) **Rail passenger cars.** If final regulations have not been issued pursuant to section 12164 of this title, a person shall be considered to have complied with the requirements of section 12162 (a) through (d) of this title that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this part and are in effect at the time such design is substantially completed.

SUBCHAPTER III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

§ 12181. Definitions

As used in this subchapter:

(1) **Commerce.** The term "commerce" means travel, trade, traffic, commerce, transportation, or communi

cation—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) **Commercial facilities.** The term "commercial facilities" means facilities—

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 of this title or covered under this chapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) **Demand responsive system.** The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) **Fixed route system.** The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) **Over-the-road bus.** The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) **Private entity.** The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) **Public accommodation.** The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) **Rail and railroad.** The terms "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (45 U.S.C. 431(e)).

(9) **Readily achievable.** The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

- (A) the nature and cost of the action needed under this chapter;
- (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) **Specified public transportation.** The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) **Vehicle.** The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

§ 12182. Prohibition of discrimination by public accommodations

(a) **General rule.** No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) **Construction.**

(1) General prohibition.

(A) Activities

(i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods. An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association. It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) **Specific prohibitions.**

(A) **Discrimination.** For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) **Fixed route system.**

(i) **Accessibility.** It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph,[1] that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service. If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph[1] that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system. For purposes of subsection (a) of this section, discrimination includes—

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title, to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph[1], that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses.

(i) Limitation on applicability. Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements. For purposes of subsection (a) of this section, discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction. Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

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[1] Effective 18 months after July 26, 1990, except subsection (a) of this section for purposes of subsection (b)(2)(B) and (C) of this section effective July 26, 1990. See § 310 of Pub. L. 101-336, set out as a note under section 12181 of this title.

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) **Application of term.** Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990 that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) **Elevator.** Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

§ 12184. Prohibition of discrimination in specified public transportation services provided by private entities

(a) **General rule.** No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) **Construction.** For purposes of subsection (a) of this section, discrimination includes—

(1) the imposition or application by an entity described in subsection (a) of this section of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with

disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to--

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title;

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(4) (A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title; and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent feasible, is made readily accessible to and

usable by individuals with disabilities, including individuals who use wheelchairs.

(c) **Historical or antiquated cars.**

(1) **Exception.** To the extent that compliance with subsection (b)(2)(C) or (b)(7) of this section would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in violation of any rule, regulation, standard, or order issued by the Secretary of Transportation under the Federal Railroad Safety Act of 1970 (45 U.S.C. et seq.), such compliance shall not be required.

(2) **Definition.** As used in this subsection, the term "historical or antiquated rail passenger car" means a rail passenger car --

(A) which is not less than 30 years old at the time of its use for transporting individuals;

(B) the manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(C) which--

(i) has a consequential association with events or persons significant to the past; or

(ii) embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

§ 12185. Study

(a) **Purposes.** The Office of Technology Assessment shall undertake a study to determine--

(1) the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service; and

(2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.

(b) **Contents.** The study shall include, at a minimum, an analysis of the following:

(1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 12184(b)(4) and 12186(a)(2) of this title, are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which no not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

(c) **Advisory committee.** In conducting the study required by subsection (a) of this section, the Office of Technology Assessment shall establish an advisory committee, which shall consist of--

(1) members selected from among private operators and manufacturers of over-the-road buses;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study, including manufacturers of boarding assistance equipment and devices.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) **Deadline.** The study required by subsection (a) of this section, along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall be submitted to the President and Congress within 36 months after July 26, 1990. If the President determines that compliance with the regulations issued pursuant to section 12186(a)(2)(B) of this title on or before the applicable deadlines specified in section 12186(a)(2)(B) of this title will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) **Review.** In developing the study required by subsection (a) of this section, the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792). The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d) of this section.

§ 12186. Regulations

(a) **Transportation provisions.**

(1) **General rule.** Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 (other than subsection (b)(4)) of this title.

(2) **Special rules for providing access to over-the-road buses.**

(A) **Interim requirements.**

(i) **Issuance.** Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require each private entity which uses an over-the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii) **Effective period.** The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (B).

(B) **Final requirement.**

(i) **Review of study and interim requirements.** The Secretary shall review the study submitted under section 12185 of this title and the regulations issued pursuant to the subparagraph (A).

(ii) **Issuance.** Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require, taking into account the purposes of the study under section 12185 of this title and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) **Effective period.** Subject to section 12185(d) of this title, the regulations issued pursuant to this subparagraph shall take effect—

(I) with respect to small providers of transportation (as defined by the Secretary), 7 years after July 26, 1990; and

(II) with respect to other providers of transportation, 6 years after July 26, 1990.

(C) **Limitation on requiring installation of accessible restrooms.** The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) **Standards.** The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b)(2) and 12184 of this title.

(b) **Other provisions.** Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) **Consistency with ATBCB guidelines.** Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards.

(1) **Facilities.** If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) **Vehicles and rail passenger cars.** If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

§ 12187. Exemptions for private clubs and religious organizations

The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship.

§ 12188. Enforcement

(a) In general.

(1) **Availability of remedies and procedures.** The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or who has reasonable grounds for believing that such person is about to be subject to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) **Injunctive relief.** In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this

title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) **Enforcement by the Attorney General.**

(1) **Denial of rights.**

(A) **Duty to investigate.**

(i) **In general.** The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) **Attorney general certification.** On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does not meet or exceed the minimum requirements of this chapter.

(B) **Potential violation.** If the Attorney General has reasonable cause to believe that—

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) **Authority of court.** In a civil action under paragraph (1)(B), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter—

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) **Single violation.** For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) **Punitive damages.** For purposes of subsection (b)(2)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

(5) **Judicial consideration.** In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

§ 12189. Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

SUBCHAPTER IV--MISCELLANEOUS PROVISIONS

§ 12201. Construction

(a) **In general.** Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) **Relationship to other laws.** Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I [42 U.S.C. 12111 et seq.], in transportation covered by subchapter II or III [42 U.S.C. 12131 et seq. or 12181 et seq.], or in places of public accommodation covered by subchapter III.

(c) **Insurance.** Subchapters I through IV of this chapter shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III.

(d) **Accommodations and services.** Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

§ 12203. Prohibition against retaliation and coercion

(a) **Retaliation.** No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) **Interference, coercion, or intimidation.** It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) **Remedies and procedures.** The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I [42 U.S.C. 12111 et seq.], subchapter II [42 U.S.C. 12131 et seq.] and subchapter III [42 U.S.C. 12181 et seq.], respectively.

§ 12204. Regulations by the Architectural and Transportation Barriers Compliance Board

(a) **Issuance of guidelines.** Not later than 9 months after July 26, 1990, the Architectural and Transportation

Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters of this chapter.

(b) **Contents of guidelines.** The supplemental guidelines issued under subsection (a) of this section, shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) **Qualified historic properties.**

(1) **In general.** The supplemental guidelines issued under subsection (a) of this section, shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) **Sites eligible for listing in National Register.** With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7 (1) and (2) of the Uniform Federal Accessibility Standards.

(3) **Other sites.** With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1) (b) and (c) of the Uniform Federal Accessibility Standards, and shall require at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 12206. Technical assistance

(a) **Plan for assistance.**

(1) **In general.** Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) **Publication of plan.** The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) **Agency and public assistance.** The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) **Implementation.**

(1) **Rendering assistance.** Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective title or titles for which such agency has responsibility.

(2) **Implementation of subchapters.**

(A) **Subchapter I of this chapter.** The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

(B) **Subchapter II of this chapter.**

(i) **Division A of subchapter II of this chapter.** The Attorney General shall implement such plan for assistance for division A of subchapter II of this chapter.

(ii) **Division B of subchapter II of this chapter.** The Secretary of Transportation shall implement such plan for assistance for division B of subchapter II of this chapter.

(C) **Subchapter III of this chapter.** The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) **Subchapter IV of this chapter.** The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for subchapter IV of this chapter.

(3) **Technical assistance manuals.** Each Federal agency that has responsibility under paragraph (2) for implementing this chapter, shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applicable final regulations are published under subchapters I, II, III, and IV of this chapter.

(d) **Grants and contracts.**

(1) **In general.** Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals,

institutions not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients of grants described in this paragraph.

(2) **Dissemination of information.** Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) **Failure to receive assistance.** An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

§ 12207. Federal wilderness areas

(a) **Study.** The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).

(b) **Submission of report.** Not later than 1 year after the enactment of this Act [July 26, 1990], the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) **Specific wilderness access.**

(1) **In general.** Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify and conditions of lands within a wilderness area in order to facilitate such use.

(2) **Definition.** For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Coverage of Congress and the agencies of the legislative branch

(a) Coverage of the Senate

(1) **Commitment to Rule XLII.** The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate which provides as follows:

"No member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap."

(2) **Application to Senate employment.** The rights and protections provided pursuant to this chapter, the Civil Rights Act of 1990 (S. 2104, 101st Congress), the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973 shall apply with respect to employment by the United States Senate.

(3) **Investigation and adjudication of claims.** All claims raised by any individual with respect to Senate employment, pursuant to the Acts referred to in paragraph (2), shall be investigated and adjudicated by the Select Committee on Ethics, pursuant to S. Res. 338, 88th Congress, as amended, or such other entity as the Senate may designate.

(4) **Rights of employees.** The Committee on Rules and Administration shall ensure that Senate employees are informed of their rights under the Acts referred to in paragraph (2).

(5) **Applicable remedies.** When assigning remedies to individuals found to have a valid claim under the Acts referred to in paragraph (2), the Select Committee on Ethics, or such other entity as the Senate may designate, should to the extent practicable apply the same remedies applicable to all other employees covered by the Acts referred to in paragraph (2). Such remedies shall apply exclusively.

(6) **Matters other than employment.**

(A) **In general.** The rights and protections under this chapter shall, subject to subparagraph (B), apply with respect to the conduct of the Senate regarding matters other than employment.

(B) **Remedies.** The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) **Proposed remedies and procedures.** For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Senate Committee on Rules and Administration. The remedies and procedures shall be effective upon the approval of the Committee on Rules and Administration.

(7) **Exercise of rulemaking power.** Notwithstanding any other provision of law, enforcement and adjudication of the rights and protections referred to in paragraph (2) and (6)(A) shall be within the

exclusive jurisdiction of the United States Senate. The provisions of paragraph (1), (3), (4), (5), (6)(B), and (6)(C) are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

(b) **Coverage of the House of Representatives**

(1) **In general.** Notwithstanding any other provision of this chapter or of law, the purposes of this chapter shall, subject to paragraphs (2) and (3), apply in their entirety to the House of Representatives.

(2) **Employment in the House.**

(A) **Application.** The rights and protections under this chapter shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) **Administration.**

(i) **In general.** In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) **Resolution.** The resolution referred to in clause (i) is House Resolution 15 of the One Hundred First Congress, as agreed to January 3, 1989, or any other provision that continues in effect the provisions of, or is a successor to, the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988).

(C) **Exercise of rulemaking power.** The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(3) **Matters other than employment.**

(A) **In general.** The rights and protections under this chapter shall, subject to subparagraph (B), apply with respect to the conduct of the House of Representatives regarding matters other than employ ment.

(B) **Remedies.** The Architect of the Capitol shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to subparagraph (A). Such remedies and procedures shall apply exclusively, after approval in accordance with subparagraph (C).

(C) **Approval.** For purposes of subparagraph (B), the Architect of the Capitol shall submit proposed remedies and procedures to the Speaker of the House of Representatives. The remedies and procedures shall be effective upon the approval of the Speaker, after consultation with the House Office Building Commission.

(c) **Instrumentalities of Congress.**

(1) **In general.** The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) **Establishment of remedies and procedures by instrumentalities.** The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively.

(3) **Report to Congress.** The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) **Definition of instrumentalities.** For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, and the United States Botanic Garden.

(5) **Construction.** Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) **In general.** For purposes of this chapter, the term " individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) **Rules of construction.** Nothing in subsection (a) of this section, shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) **Health and other services.** Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) **Definition of illegal use of drugs.**

(1) **In general.** The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(2) **Drugs.** The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

§ 12211. Definitions

(a) **Homosexuality and bisexuality.** For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) **Certain conditions.** Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall not be severed from the remainder of the chapter, and such action shall not affect the enforceability of the remaining provisions of the chapter.

AMENDMENTS MADE BY THE CIVIL RIGHTS ACT OF 1991 (Pub. L. 102-166)

[42 U.S.C. § 12111(4) is amended by § 109(a) of the Civil Rights Act of 1991 by adding at the end the following:]

With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

[42 U.S.C. § 12112 is amended by § 109(b)(2) of the Civil Rights Act of 1991 by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection:]

(c) Covered Entities in Foreign Countries.—

(1) In general.—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign

country in which such workplace is located.

(2) Control of corporation.—

(A) Presumption.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination —For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation."

[42 U.S.C. § 12209 is amended by § 315 of the Civil Rights Act of 1991 as follows:]

(1) in subsection (a)—

(A)by striking paragraphs (2) through (5);

(B)by redesignating paragraphs (6) and (7) as paragraphs (2) and (3), respectively; and

(C)in paragraph (3), as redesignated by subparagraph (B) of this paragraph—

(i) by striking "(2) and (6)(A)" and inserting "(2)(A)", as redesignated by subparagraph (B) of this paragraph; and

(ii) by striking "(3), (4), (5), (6)(B), and (6)(C)" and inserting "(2)"' and

(2) in subsection (c)(2), by inserting ", except for the employees who are defined as Senate employees, in section 301(c)(1) of the Civil Rights Act of 1991 after "shall apply exclusively".

UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT

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PRESIDENT'S COMMITTEE ON
EMPLOYMENT OF PEOPLE WITH DISABILITIES
WASHINGTON, D.C. 20004-1107

FACT SHEET ON:

THE AMERICANS WITH DISABILITIES ACT
PUBLIC LAW 101-336

PURPOSE

The Americans with Disabilities Act prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and activities of state and local government. Telecommunications relay services are established.

EFFECTIVE DATES

The Americans with Disabilities Act was signed into law on July 26, 1990. Provisions of the law become effective at various times ranging from 30 days to 30 years. Here is a summary:

- **Employers** with 25 or more workers, July 26, 1992.
- **Employers** with 15 or more workers, July 26, 1994.
- **State and local Government** activities, January 26, 1992.
- In general, **Public Accommodations** must be in compliance on January 26, 1992.
- **Transportation phase-ins** for accessibility range from 30 days to 30 years. (See details under transportation.)
- **Telecommunication relay services** become effective three years after the effective date of the law.

EMPLOYMENT REQUIREMENTS

Employers, employment agencies, labor organizations and joint labor-management committees must:

- Have non-discriminatory application procedures, qualification standards, and selection criteria and in all other terms and conditions of employment.
- Make reasonable accommodation to the known limitations of a qualified applicant or employee unless to do so would cause an undue hardship.

Exceptions

The bill makes exceptions regarding the employment of a person with a contagious disease, a person who illegally uses drugs or alcohol, employment of someone by a religious entity, and private membership clubs.

TRANSPORTATION
(PUBLICLY AND PRIVATELY OWNED)

- All purchase or lease orders for new buses and rail cars must be for accessible vehicles

- Paratransit services must be accessible to, and usable by, people with disabilities. The system must provide a level of service equivalent to that provided non-disabled persons. The providing entity must ensure that all persons with disabilities who need the service can use it. The plan must be submitted by January 26, 1992.

- All demand-response service provided to the general public, and privately-funded fixed route service, must purchase accessible vehicles only, unless it can be shown that the service is accessible when viewed in its entirety. However, all new vehicles which carry more than 16 passengers purchased by a privately-funded fixed route service must be accessible.

- Newly-purchased over-the-road coaches purchased after July 26, 1996 must be accessible. In the case of small companies, the effective date is July 26, 1997. The President can extend this for one year further. The bill commissions a three-year study to determine the best way to provide access to over-the-road coaches.

- New bus and rail terminals must be accessible. In altered facilities, the area remodeled must be accessible to the maximum extent feasible. In major structural alterations, a path of travel to the altered area, including restrooms and other services located in the area, must be accessible.

- Key rail stations must be accessible within three years with extensions available up to 20 years (30 years for some rapid or light rail stations). Amtrak stations must be accessible in 20 years.

- Within five years, one rail car per train must be accessible.

PUBLIC ACCOMMODATIONS

Included is any entity licensed to do business with, or serve, the public such as hotels, theaters, restaurants, shopping malls, stores, office buildings and private social service agencies. They must:

- Assure that criteria for eligibility of services do not discriminate. Auxiliary aids and services are required unless they result in an undue burden or fundamentally alter the nature of the goods or services.

- Remove barriers from existing facilities when such removal is readily achievable. If not, alternative methods of making goods and services available must be provided.

- Make altered facilities accessible to the maximum extent feasible. In major structural renovations, a path of travel to the altered area, including restrooms and other services, must be accessible.

- New facilities must be accessible. Generally, other than health-care facilities and multilevel shopping malls, elevators need not be provided in buildings with less than three floors, or less than 3,000 square feet per floor.

STATE AND LOCAL GOVERNMENT

- State or local governments may not discriminate against qualified individuals with disabilities. All government facilities, services, and communications must be accessible consistent with the requirements of section 504 of the Rehabilitation Act of 1973.

TELECOMMUNICATIONS RELAY SERVICES

Within three years after the effective date of the law, phone companies serving the public (interstate and intrastate) must provide TDD relay services for persons with hearing impairments on a 24-hour basis and at no extra charge.

ENFORCEMENT

- The Equal Employment Opportunity Commission enforces regulations covering employment. For information call 1/800/669-3362 Voice, 1/800/800-3302 TDD.
- The Architectural and Transportation Barriers Compliance Board has the responsibility to issue minimum guidelines to ensure that buildings, facilities, and transit vehicles are accessible and usable by people with disabilities. For information call 202/653-7848 Voice/TDD, 1/800/872-2253 Voice/TDD.
- The Department of Transportation enforces regulations governing transit. For information call 202/366-9306 or 4011 Voice, 202/755-7687 or 366-2979 TDD.
- The Federal Communications Commission enforces regulations covering telecommunication services. For information call 202/632-7260 Voice, 202/632-6999 TDD.
- The Department of Justice enforces regulations governing public accommodations and State and local government services. For information call 202/514-0301 Voice, 202/514-0381 or 0383 TDD.

PENALTIES

Administrative remedies and the right to sue in Federal Court are available. Attorney's fees for prevailing parties are available. The U.S. Attorney General can file suits and seek penalties. States can be sued.

ABOUT ACCOMMODATIONS

Generally, they are not expensive. Many work-station adaptations to accommodate a worker with a disability cost little or nothing. From evaluation of data, the Job Accommodation Network, an international information network and consulting resource for accommodating persons with disabilities in the work place, found that 31% of the accommodations suggested cost nothing, 19% cost \$50 or less and 70% cost under \$500.

When making an accommodation, consult the individual with disability. Also, the Job Accommodation Network can provide **FREE** technical assistance. Phone JAN on 1/800/526-7234 Voice and TDD, 1/800/526-4698 in W. VA. Voice and TDD.

DISABILITY DEFINED

Anyone with a physical or mental impairment substantially limiting one or more major life activities; has a record of such impairment; or is regarded as having such an impairment, is considered a person with a disability.

In terms of employment, the law defines a "qualified individual with a disability" as a person with a disability who can perform the essential functions of the job with or without reasonable accommodation

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FOR ADDITIONAL GENERAL INFORMATION

Write to:

President's Committee on Employment of People with Disabilities,
1331 F Street, NW, Washington, D.C. 20004-1107

Phone: 202/376-6200 (voice)
202/376-6205 (TDD)
202/376-6219 (FAX)

All public documents produced by the President's Committee on Employment of People with Disabilities are available in alternative formats.

January, 1992

President's Committee on Employment
of People with Disabilities

THE AMERICANS WITH DISABILITIES ACT

REGULATIONS

Copies of ADA Regulations can be obtained as follows:

TITLE I - Employment Regulations

Equal Employment Opportunity Commission
1801 L. Street, N.W.
Room 9024
Washington, DC 20507
1-800-669-3362 - Voice - ADA Helpline
1-800-800-3302 - TDD - ADA Helpline
1-202-663-4264 - ADA Publications Only

Alternative formats are available in large print, Braille, electronic file on computer disk, and audio-tape from the following numbers:

(202) 663-4398 - Voice
(202) 663-7110 - TDD

TITLE II-A - Public Services Operated by State and Local Governments

and

TITLE III - Public Accommodations and Services Operated by Private Entities

U.S. Department of Justice
P.O. Box 66118
Washington, DC 20530-6118
(202) 514-0301 - Voice
(202) 514-0381 - TDD

Alternative formats are available in large print, Braille, electronic file on computer disk, and audio-tape.

(over)

1331 F Street, N.W. • Washington, DC 20004-1107 • 202-376-6200 (Voice) • 202-376-6205 (TDD) • 202-376-6219 (Fax)

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES; FINAL GUIDELINES

Architectural and Transportation Barriers
Compliance Board
1331 F. Street, N.W.
Suite 1000
Washington, DC 20004-1111
1-800-872-2253 - Voice/TDD
(202) 272-5434 - Voice/TDD

Alternative formats are available in large print, Braille, computer disk and cassette tape.

All of the above rules are available on the electronic bulletin board accessed by dialing (202) 514-6193.

TITLE IV - Telecommunications Relay Services For Hearing-Impaired and Speech-Impaired Individuals

Federal Communications Commission
Office of Public Affairs
1919 M Street, N.W.
Room 254
Washington, DC 20554
(202) 632-7260 - Voice
(202) 632-6999 - TDD

TRANSPORTATION - Transportation for Individuals with Disabilities

Department of Transportation
400 Seventh Street, S.W.
Room 10424
Washington, DC 20590
(202) 366-9306 - Voice
(202) 755-7687 - TDD
or
Department of Transportation
400 Seventh Street, S.W.
Room Room 9316
Washington, DC 20590
(202) 366-4011 - Voice
(202) 366-2979 - TDD

Copies of the rule in accessible formats will be made available upon request

MKR - 04/30/92

President's Committee on Employment
of People with Disabilities

Telephone Numbers for ADA Technical Assistance

President's Committee on Employment of People with Disabilities
202-376-6200 (Voice) 202-376-6205 (TDD) 202-376-6219 (Fax)

Job Accommodation Network (A Service of the President's Committee)
800-526-7234 (Voice/TDD) 800-526-4698 (Voice/TDD, W. Va. only)

Architectural and Transportation Barriers Compliance Board
800-872-2253 (Voice/TDD) 202-272-5434 (Voice/TDD)

U.S. Department of Justice
202-514-0301 (Voice) 202-514-0381 (TDD)

U.S. Department of Transportation
202-366-9306 or 4011 (Voice) 202-755-7687 or 366-2979 (TDD)

Disability Rights Education and Defense Fund
800-466-4232 (Voice/TDD) 202-986-0375
510-644-2555 (Voice) 510-644-2629 (TDD)

Equal Employment Opportunity Commission
800-669-3362 (Voice) 800-800-3302 (TDD)

Federal Communications Commission
202-632-7260 (Voice) 202-632-6999 (TDD)

National Association of the Deaf
301-587-1788 (Voice) 301-587-1789 (TDD)

National Association of Protection and Advocacy Systems
202-408-9514 (Voice) 202-408-9521 (TDD)

National Center for Law and the Deaf
202-651-5373 (Voice/TDD)

National Institute on Disability and Rehabilitation Research
202-732-1139 (Voice) 202-732-5316 (TDD)

Project Action - National Easter Seal Society
202-347-3066 (Voice) 202-347-7385 (TDD)

Rehabilitation Services Administration
202-732-1331 (Voice) 202-732-4538 (TDD)

National Institute on Disability and Rehabilitation Research (NIDRR) Regional Disability and Business Technical Assistance Centers (DBTACs)

1-800-949-4232 V/TDD

your free call will ring through to the NIDRR DBTAC responsible for the region that contains your area code

I New England DBTAC CT, ME, MA, NH, RI, VT	U. of So. Maine; Muskie Institute of Public Affairs	Jennifer Eckel	145 Newbuey St. Portland, ME 04101 207-874-6535 V/TDD 207-874-6529 fax
II Northeast DBTAC NJ, NY, PR, VI	United Cerebral Palsy Ass./NJ	Richard Dodds	354 So. Broad St. Trenton, NJ 08608 609-392-4004 609-392-7044 TDD 609-392-3505 fax
III Mid Atlantic DBTAC DE, DC, MD, PA, VA, WV	Endependence Ctr. of No. Virginia	Sharon Mistler	2111 Wilson Blvd., # 400 Arlington, VA 22201 703-525-3268 V/TDD 800-232-4999 703-525-6835 fax
IV Southeast DBTAC AL, FL, GA, KY, MS, NC, SC, TN	United Cerebral Palsy Ass., Inc. / Nat. Alliance of Business	Shelley Kaplan	1776 Peachtree Rd.,#310N Atlanta, GA 30309 404-888-0022 404-888-9098 V/TDD 404-888-9091 fax
V Great Lakes DBTAC IL, IN, MI, MN, OH, WI	U. of Illinois at Chicago / U. Affiliated Program	David Braddock	1640 W. Roosevelt Rd. M/C 627 Chicago, IL 60608 312-413-7756 V/TDD 312-413-1326 fax
VI Southwest DBTAC AR, LA, NM, OK, TX	Independent Living Research Utilization / The Inst. for Rehab. & Research	Lex Frieden	2323 S. Shepherd St. Suite 1000 Houston, TX 77019 713-520-0232 713-520-5136 TDD 713-520-5783 fax
VII Great Plains DBTAC IA, KS, NE, MO	U. of Missouri at Columbia	Jim de Jong	4816 Santana Dr. Columbia, MO 65203 314-882-3600 V/TDD 314-884-4925 fax
VIII Rocky Mtn. DBTAC CO, MT, ND, SD, UT, WY	Meeting the Challenge, Inc.	Randy W. Dipner	3630 Sinton Rd., # 103 Colorado Springs, CO 80907-5072 719-444-0252 V/TDD 719-444-0269 fax
IX Pacific DBTAC AZ, CA, HI, NV, Pacific Basin	Berkeley Planning Associates	Erica Jones	440 Grand Ave., #500 Oakland, CA 94610 510-465-7884 800-949-4232 TDD 510-465-7885 fax
X Northwest DBTAC AK, ID, OR, WA	Washington State Gov.'s Comm. on Disability Issues & Employment	Toby Olson	P.O. Box 9046 Olympia, WA 98507-9046 206-438-3168 206-438-3167 TDD 800-HELP-ADA 206-438-4014 fax

05/11/92

THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES

Employer Resources

Programs and Resources for Employers

Employer Incentives/Resources

Program	Description	Restrictions	More Information
Abledata	Contains more than 15,000 listings of adaptive devices for all disabilities. A consumer referral service that responds with printed reports to requests for information.	Does not make diagnoses.	Abledata 8455 Colesville Rd. #935 Silver Spring, MD 20910 -3319 1-800-346-2742 voice/tdd 301-588-9284 voice/tdd
Disabled Access Credit (Section 44 of the IRS Code)	Encourages small businesses to comply with the Americans with Disabilities Act by allowing a tax credit of up to $5,000 a year.	Expenditures must exceed $250 and may not exceed $10,250. Can only deduct up to 50% of "eligible access expenditures".	Internal Revenue Service
IBM Special Needs Information Referral Center	Conducts database searches in response to specific queries. Will provide resource guides and instructional videotapes upon request.	None	1-800-426-2133 voice 1-800-284-9482 tdd
Job Accommodation Network (JAN)	Free consulting service on available aids, devices and methods for accommodating workers with disabilities.	None	1-800-526-7234 voice/tdd
Job Training and Partnership Act (JTPA)	Customized training or retraining to meet local employer needs.	Employer must hire trainee with intent of permament full-time position.	Private Industry Council (State or Local) Chamber of Commerce City or State government
Special Education Transition and Vocational Education Training Programs	Provides training, placement and on-the-job supervision for youth with disabilities. Can gear training to local employer needs.	Restricted to school-age youth.	Local secondary school authorities.
Supported Employment	A technique for providing on-the-job supervision for an extended time period for workers with severe disabilities.	Employer may be required to help fund the cost of "job coaches".	Local Vocational Rehabilitation Agency or secondary school authorities.

Employer Resources (cont'd)

Program	Description	Restrictions	More Information
Targeted Jobs Tax Credit (TJTC)	Tax credit of 40% of first $6,000 earned per employee provided the employment lasts at least 90 days or 120 hours.	May not claim TJTC and OJT for same wages. Certification must be requested on or before first day of work.	IRS (See Publication #907) State Employment Service Private Industry Council Vocational Rehabilitation (Check State and City government)
Tax Credit on Architectural and Transportation Barrier Removal (Section 190 of the IRS Code)	Tax deduction on up to $15,000 spent to make a workplace more accessible for employees and customers.	Improvements must meet Treasury Department standards.	Internal Revenue Service
Vocational Rehabilitation On-The-Job Training Program	Shared payment of the disabled employee's wages for a limited time on a negotiated schedule.	Worker must be a VR client. Position must be permanent, full-time, pay minimum wage.	Local Vocational Rehabilitation Agency
Windmills (Attitudinal Awareness Training)	Enables employers to build more understanding and acceptance in the workplace.	None	California Governor's Committee for Employment of Disabled Persons 916-323-2545

For Additional General Information

Write to:

President's Committee on Employment
of People with Disabilities
1331 F Street, NW, Washington, DC
20004-1107

Phone: 202-376-6200 (Voice)
202-376-6205 (TDD)
202-376-6219 (FAX)

All public documents produced by the President's Committee on Employment of People with Disabilities are available in alternative formats.

THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES**
1331 F. STREET, NW
WASHINGTON, DE 20004-1107
(202) 376-6200 (voice) 376-6205 (TDD) 376-6219 (FAX)

PUBLICATIONS

6-353	People Just Like You—An Activity Guide
6-390	Accion Afirmativa Para Personas Con Impedimento
6-420	Respond to: Workers with Disabilities
6-445	Independent Living Ideas: Job Tips for People with Mental or Emotional Problems
6-451	Independent Living Ideas: The Volunteer Path to Employment
6-456	Special Report: Disabled Women in America
6-466	Disabled Americans at Work
6-467	Disabled Adults in America
6-470	Disabled Adults of Hispanic Origin
6-473	Special Report: Black Adults with Disabilities
6-484	Employers are Asking About Accommodating Workers with Disabilities
6-497	College Freshmen with Disabilities Preparing for Employment
6-503	This is the President's Committee
6-516	President's Committee/Howard University Proceedings of National Conference—Building Bridges to Independence
6-540	Worklife, Fall (ADA Special) 1990* Includes Public Law 101-336 *Limited Copies Available
6-541	Employer Incentives when Hiring People with Disabilities
6-542	Fact Sheet on Medical Examinations: Are they Beneficial?
6-543	Fact Sheet on: The Americans with Disabilities Act
6-544	President's Committee on Employment of People with Disabilities ADA Brochures Check items requested: ☐ ADA in Brief ☐ Focus on Disabled Veterans ☐ Focus on Employment ☐ Focus on Public Accommodations ☐ Focus on Telecommunications ☐ Focus on Transportation

Because supplies of some publications are limited, we ask that you contact us at the address on page one before advertising the availability of any of these publications. Alternative formats are available.

** This form is adapted from the President's Committee flyer of available publications.

For further information on specific topic areas contact:

Architectural & Transportation Barriers Compliance Board
1331 F. Street, NW 10th Floor
Washington, DC 20004-1111
Voice and TDD: (202) 272-5434
Voice and TDD: (800) 872-2253

Clearinghouse on Disability Information
Switzer Building, Room 3132
330 C. Street, SW
Washington, DC 20202-2524
Voice and TDD: (202) 732-1241 or 732-1723

Job Accommodation Network (JAN)
West Virginia University
809 Allen Hall
Morgantown, WV 26506-6123
Toll-free information service (Voice/TDD)
Outside West Virginia: (800) 526-7234
West Virginia: (800) 526-4698
Canada: (800) 526-2262

ADA Information (Voice/TDD): (800) ADA-WORK
Computer Bulletin Board: (800) DIAL-JAN

National Rehabilitation Information Center
8455 Colesville Road #935
Silver Spring, MD 20910-3319
Voice and TDD: (301) 588-9284

President's Committee on Mental Retardation
330 Independence Ave., SW
Room 5325
Washington, DC 20201-0001
Voice: (202) 619-0634

March 1992

Job
Accommodation
Network

JAN

ADA Evaluation Checklist and Guide

Provided by:

Job Accommodation Network

(A Service of the President's Committee
on Employment of People with Disabilities)

809 Allen Hall; WVU
P.O. Box 6123
Morgantown, WV 26506-6123

Phone:

1-800-526-7234 (In U.S. except W.V.)
1-800-526-4698 (In W.V.)
1-800-526-2262 (In Canada)

JOB ACCOMMODATION NETWORK

Established in 1983 as a service of the President's Committee on Employment of People with Disabilities, the Job Accommodation Network (JAN) is an information network and consulting resource to enable qualified workers with disabilities to be hired or retained. Businesses, rehabilitation professionals and persons with disabilities can discuss their concerns and information needs with JAN's Human Factors Consultants and receive immediate suggestions on solutions to accommodation problems. JAN offers comprehensive information on methods and available equipment that have proven effective for a wide range of accommodations. Included will be names, addresses and phone numbers of appropriate resources. You can make personal contacts for additional insights. Information can be provided by phone or mail, and is available at no cost to the caller.

For Further Information On Ways To Make "Reasonable Accommodation" Please Contact:

The Job Accommodation Network
West Virginia University
809 Allen Hall
Morgantown, WV 26506-6123
1-800-526-7234 in US
1-800-526-4698 in WV
· 1-800-526-2262 in Canada
All Lines Voice/TDD

PRE-INTERVIEW CHECKLIST FOR EMPLOYERS

1. Is your interview facility accessible to individuals with disabilities?
   ______ Yes ______ No ______ Unsure

   If "NO" or "UNSURE" conduct an accessibility survey, or arrange for such a survey to be done by an organization concerned with disability issues.

2. Is your interview site (office conference room, etc.) accessible?
   ______ Yes ______ No ______ Unsure

3. Do you know the name of the person you are to interview?
   ______ Yes ______ No

   If "NO" find out and be prepared to address the individual by name.

4. Is this interview EXPLORATORY or AN INTERVIEW FOR A SPECIFIC POSITION?
   ______ EXPLORATORY ______ SPECIFIC POSITION

   If it is EXPLORATORY, focus on skills, knowledge, and abilities. If it is AN INTERVIEW FOR A SPECIFIC POSITION, proceed to next question.

5. If this is AN INTERVIEW FOR A SPECIFIC POSITION, do you know the requirements of the position?
   ______ Yes ______ No

   If "NO" you should find out. You must be able to describe "essential" and "marginal" functions of the position. This will allow you and the interviewee to determine if he/she is qualified and what reasonable accommodations, if any, are required.

JOB ACCOMMODATION NETWORK

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with Disabilities

6. Will the interviewee be expected to complete any paperwork (application, INS forms, security pass, etc.) before or during the interview?
_______ Yes _______ No

7. If the answer to question 6 is YES, are you or your employees prepared to offer assistance to individuals with disabilities which limit their reading, writing, or document handling capabilities?
_______ Yes _______ No

If "NO "make some arrangements BEFORE the situation arises.

8. Are you apprehensive about interviewing a person with a disability?
_______ Yes _______ No _______ Unsure

If your honest answer is "YES" or "UNSURE," the best advice is to interview the individual with a disability in the same way you would interview anyone else. There are also some excellent resources available to address your concerns. You should keep in mind that there may be some small adjustments you may have to make to facilitate communication and to be polite:

a. Always talk to the person you're interviewing, not the sign language interpreter or other assistant, if one is present.
b. Don't lean on a person's wheelchair. The chair is a part of that individual's personal space.
c. After the initial greeting, sit down so that a person who uses a wheelchair won't have to crane his/her neck to look up and make eye contact.
d. Shake whatever a person offers in greeting: hand, prosthesis, hook, elbow, etc.
e. Where possible, sit so that your face is not in shadow. This will make things easier for the hearing impaired person who reads lips. Also try to keep your hands away from your mouth.
f. Be prepared to be flexible in your communication style.
g. If no sign language interpreter is present, ask how an individual with a hearing impairment would prefer to communicate (paper and pencil, lip reading, computer terminal, etc.).
h. Try not to be disconcerted if an individual with an obvious vision impairment does not make eye contact.

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with Disabilities

WHAT TO ASK (AND NOT TO ASK) DURING THE INTERVIEW

Q. Should you discuss the nature of the company?

A. YES. Individuals with disabilities are just as interested as anyone else.

Q. Should you discuss and describe the content of the specific position for which you are interviewing?

A. YES. You must give a precise description of the functions to be performed, the outputs expected, and the physical working environment. Only then can accommodations be discussed, should they be necessary.

Q. Should you ask if the individual has a valid driver's license?

A. NO. Only ask this question if driving is an "essential function" of the position for which you are interviewing. Be sure all questions are job-related.

Q. Should you ask ~~how an individual with a disability will get to~~ work?

A. NO. This is not your concern. If your company offers some form of vanpool or other transportation service to all employees, you should ensure that it is accessible to individuals with disabilities and discuss it as you would with any other applicant.

Q. If you notice a disabling condition (individual uses a wheelchair, guide dog, hearing aid, etc.) should you ask what caused the disability?

A. NO. This is, frankly, none of your business.

JAN
JOB ACCOMMODATION NETWORK

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with Disabilities

Q. If you notice an obvious disability, can you ask about accommodations?

A. NO. It is only appropriate to ask if the individual can perform the functions of the job. Emphasis on how the job is performed may elicit from the interviewee information as to what, if any accommodations he/she may need.

Q. Should you send an individual with a disability for a pre-employment medical examination?

A. NO. You can require a medical exam AFTER A CONDITIONAL OFFER OF EMPLOYMENT, but only if you require it of all individuals applying for the same type of position.

NOTE: Drug testing is not considered a pre-employment medical examination for purposes of the Americans with Disabilities Act, and therefore is permissible BEFORE a conditional offer of employment.

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ADA SELF-EVALUATION GUIDE

Americans with
Disabilities
Act
(Public Law 101-336)

REPRINTED WITH PERMISSION FROM THE TEXAS GOVERNOR'S COMMITTEE
FOR DISABLED PERSONS

Self-Evaluation Guide

For Business and Other Covered Entities

Developed by Texas Governor's Committee for Disabled Persons and The Office for Civil Rights, U.S. Department of Health and Human Services

The self-evaluation guide includes items found in Title I - Employment and Title III - Public Accommodations and Services of the Americans with Disabilities Act. It is designed to help employers and business owners comply with the law. It is a tool for identifying and eliminating potential problem areas identified in the law.

A time-proven method for conducting a successful self-evaluation involves identifying a mix of knowledgeable people with disabilities as well as professionals in the rehabilitation field and advocates for people with disabilities to consult with your organization on barriers to employment and general accessibility. A partial list of disability groups and organizations which may help you to identify people in your area to assist with your self-evaluation is located at the back of this document under Part III, Information & Assistance.

How To Use The Self-Evaluation Guide

The Self-Evaluation Guide has been re-worded from legal language into language that is easier to read and understand. A notation in the margin next to each question in the guide cites the reference for that question in PL 101-336. The guide is divided into four major parts for your convenience.

Part I deals with issues affecting Title I employers and includes a brief introduction and a summary of key definitions.

Part II deals with Title III public accommodation issues.

Note: Both Part I and Part II are in checklist form and a "No" answer to a question indicates an area of needed improvement. The Action/Due Date is the improvement (action) that needs to be made and the date of estimated completion for the improvement.

Part III is a partial list of agencies, organizations and disability groups which can provide you with information and assistance.

Part IV is a brief accessibility checklist to get you started on removal of barriers in your business.

Self-Evaluation Guide
For Business and Other Covered Entities

Parts I and II of the Self-Evaluation Guide include items found in Title I-Employment and Title III - Public Accommodations and Services of the Americans with Disabilities Act. Explanation and documentation to support and describe answers given will provide a proper evaluation of your business using the Self-Evaluation Guide. We recommend that you retain this information on file as evidence of your efforts at compliance.

Title I: Employment

Title I prohibits covered employers from discriminating against a "qualified individual with a disability in any term, condition or privilege of employment".

Key Definitions Summary

(Important: See Public Law 101-336, Title I, Section 101 for detailed definitions)

Covered Entity - means an employer, employment agency, labor organization or joint labor-management committee.

Employer - means a person engaged in an industry affecting commerce Who Has 15 Or More Employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Qualified Individual with a Disability - means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Reasonable Accommodation - means (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.

Undue Hardship - means an action requiring significant difficulty or expense when considered in light of the factors set forth in in Section 101(10)(B) of the law, such as the nature and cost of the accommodation, the overall financial resources of the covered entity and the type of operations of the covered entity.

Effective Dates
July 26, 1992 - Employers with 25 or more employees
July 26, 1994 - Employers with 15 or more employees

Self-Evaluation Guidelines For Title I

Sect 102(a)

1. Have you reviewed your employment policies (recruiting, hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring) to be sure that you and your employees are giving nondiscriminatory treatment to applicants and employees with disabilities?

Yes _____ No______ Action/Due Date: ______________________

Sect 102(b)(1)

2. Have you reviewed your employment practices to make sure that they do not limit, segregate or classify job applicants or employees in ways that adversely affect the opportunities or status because of the disability of the applicant or employee?

Yes _____ No______ Action/Due Date: ______________________

Sect 102(b)(2)

3. Have you reviewed your employment practices to make sure that you are not participating in a contractual or other arrangement or relationship that subjects your qualified applicant or employee with a a disability to discrimination (i.e., relationships with employment or referral agencies, labor unions, or organizations that provide fringe benefits, training or apprenticeship programs)?

Yes _____ No______ Action/Due Date: ______________________

Sect 102(b)(3)

4. Have you reviewed your employment practices to make sure that you are not using standards, criteria or methods of administration that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control?

Yes _____ No______ Action/Due Date: ______________________

Sect 102(b)(4)

5. Have you reviewed your employment practices to make sure that you are giving nondiscriminatory treatment to applicants and employees who have a friend, associate or family member with a disability?

Yes _____ No______ Action/Due Date: ______________________

Sect 102(b)(5)(A)
6. Have you determined the process you will use to decide at which point "reasonable accommodation" causes an "undue hardship"?

Yes_____ No______ Action/Due Date: ______________________

Sect 102(b)(5)(A)
7. Do you have a policy concerning "reasonable accommodation"?

Yes_____ No______ Action/Due Date: ______________________

Sect 102(b)(5)(B)
8. Do you have a procedure to document decisions not to hire or promote because of "undue hardship"?

Yes_____ No______ Action/Due Date: ______________________

Sect 102(b)(6)
9. Have you reviewed the requirements of your jobs (job descriptions, employment tests or other selection criteria) to be sure that no criteria are included that would discriminate against an individual with a disability unless such criteria are job-related and consistent with business necessity?

Yes_____ No______ Action/Due Date: ______________________

Sect 102(b)(7)
10. Are your hiring procedures (applying, testing and interviewing for a job) carried out in wheelchair accessible locations and accessible formats, such as a reader/Braille/audio cassette for vision-impaired people, written materials/sign language interpreters for hearing-impaired people and personal assistance for people with manual impairments?

Yes_____ No______ Action/Due Date: ______________________

Sect 102(b)(7)
11. Have you made sure that employment tests are selected and administered in a way to ensure that test results accurately reflect the skills or aptitude necessary to perform the job rather than reflect the impaired sensory, manual, or speaking skills of the applicant or employee, unless the sensory, speaking, or manual ability is necessary to perform critical element(s) of the job?

Yes_____ No______ Action/Due Date: ______________________

Sect 102(c)
12. Have you made sure that your employment application forms do not contain questions as to whether an applicant is an individual with a disability?

Yes_____ No______ Action/Due Date: ______________________

Sect 102(c)
13. If your business conditions an offer of employment based upon the job applicant's satisfactory completion of a medical examination, do your procedures conform to the requirements of the law prohibiting inquiries as to the nature and severity of disabilities except as they are job-related?

Yes_____ No______ Action/Due Date: ______________________

Sect 104
14. Have you reviewed your personnel policies and practices to be sure that an applicant or employee who is a recovering alcohol or drug abuser (not currently using alcohol or drugs) is included in accordance with the law?

Yes_____ No______ Action/Due Date: ______________________

Sect 105
15. Have you posted equal employment opportunity notices in an accessible format (i.e. in large print, Braille, and audio cassette) in accordance with Section 105, Posting Notices?

Yes_____ No______ Action/Due Date: ______________________

The following steps are Highly Recommended But Not Directly Mandated by the Americans with Disabilities Act (ADA):

1. Have you made sure that individuals with disabilities are allowed the opportunity to participate as members of your planning or advisory boards?

Yes _____ No ______ Action/Due Date: ____________________

2. Have you designated someone to coordinate your efforts to comply with the ADA?

Yes _____ No ______ Action/Due Date: ____________________

3. Have you established grievance procedures that incorporate due process standards and that provide for the prompt and equitable solution of complaints of discrimination against an individual with a disability, including job applicants, employees, customers and visitors?

Yes _____ No ______ Action/Due Date: ____________________

4. Have you notified unions and professional organizations with whom you have collective bargaining or other professional agreements of your nondiscrimination policy?

Yes _____ No ______ Action/Due Date: ____________________

5. Do your written materials (publications) include a notice of nondiscrimination?

Yes _____ No ______ Action/Due Date: ____________________

6. When you recruit for employees, do your procedures include all types of individuals with disabilities because of the nature of the media used, i.e., print media for individuals with hearing impairments and large print, Braille or verbal media for persons with vision impairments?

Yes _____ No ______ Action/Due Date: ____________________

7. Have you reviewed policies related to hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring to ensure that they are not discriminatory?

Yes _____ No ______ Action/Due Date: ____________________

8. Have you reviewed medical, hospital, accident, life insurance, and retirement fringe benefits to ensure that they give nondiscriminatory treatment to people with disabilities?

Yes _____ No ______ Action/Due Date: ____________________

9. Are your business's social and recreational activities made accessible to all employees?

Yes _____ No ______ Action/Due Date: ____________________

Title III: Public Accommodations And Services Operated By Private Entities

Title III prohibits discrimination denying full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodation of any place of public accommodation.

Key Definitions Summary

(Important: See Title III, Section 301 for detailed definitions)

Commerce - means travel, trade, traffic, commerce, transportation, or communication.

Commercial Facilities - means facilities that are intended for nonresidential use and whose operations will affect commerce.

Public Accommodation - covers entities which affect commerce including

- lodging places with more than 5 rooms
- establishments serving food or drink
- places of entertainment
- gathering places such as auditoriums and convention centers
- retail sales establishments
- service establishments such as doctor and lawyer offices, banks
- cultural facilities such as museums, galleries, libraries
- parks and zoos
- educational facilities
- social service centers
- places of exercise and recreation

Residential, religious groups and private clubs are excluded.

Readily Achievable - means easily accomplishable and able to be carried out without much difficulty or expense.

Auxiliary Aids and Services - includes qualified interpreters for individuals with hearing impairments, qualified readers and taped texts for individuals with visual impairments and acquisition or modification of equipment and other similar services and actions.

Effective Dates - Generally - January 26, 1992, New Construction - January 26, 1993

Self-Evaluation Guide For Title III

Have you reviewed your business as a covered entity under Title III - Public Accommodations and Services, Section 301(7)

to make certain that...

Sect 302(a,b)

1. nondiscriminatory treatment is given directly or through contractural licensing or other arrangements to people with disabilities in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that are equal to that afforded to other individuals and that they are not provided differently or separately unless such action is necessary to ensure that they are as effective as those provided to others?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(1)(B)

2. goods, services, facilities, privileges, advantages, and accommodations are offered and provided to an individual with a disability in the most integrated setting (same setting offered to others) appropriate to the needs of the individual?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(1)(C)

3. even if separate or different programs or activities are provided for individuals with disabilities, they are not denied the opportunity to participate in those that are not separate or different if they so choose?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(1)(D)

4. you utilize, directly and/or through contractual or other arrangements, standards or criteria or methods of administration that do not have the effect of discrimination by others that are subject to common administrative control?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(1)(E)
5. people with friends, associates or relatives with a disability are provided goods, services, facilities , privileges, advantages, accommodations, and other opportunities on a nondiscriminatory basis?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(2)(A)(I)
6. eligibility criteria screen in, not out, individuals with disabilities (unless such criteria can be shown to be necessary for the provision of the goods, services, etc.... being offered)?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(2)(A)(ii)
7. reasonable modifications are made to policies, practices or procedures, when such modifications are necessary to offer goods or services, etc., to individuals with disabilities, unless doing so would fundamentally alter the goods or services, etc.?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(2)(A)(iii)
8. people with disabilities are included, allowed services, integrated and otherwise treated the same as others through the provision of auxiliary aids and services, unless doing so would fundamentally alter the nature of the good, service, etc.?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(2)(A)(iv)
9. architectural barriers and communication barriers that are structural in nature including permanent, temporary or movable structures, such as furniture, equipment and display racks, are removed from existing facilities where such removal is "readily achievable"?

Yes_____ No______ Action/Due Date: ______________________

Sect 302(b)(2)(A)(v)

10. where removal of a barrier is not "readily achievable" that goods, services, etc., are made available through alternative methods if such methods are "readily achievable"?

Yes _____ No ______ Action/Due Date: ______________________

Sect 303(a)(1)

11. new construction with first occupancy after January 26, 1993, has been/will be designed to be readily accessible to and usable by individuals with disabilities?

Yes _____ No ______ Action/Due Date: ______________________

Sect 303(a)(2)

12. if you are altering a facility, alterations are made in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs?

Yes _____ No ______ Action/Due Date: ______________________

Note: The Uniform Federal Accessibility Standards (UFAS) is the interim standard for accessibility for new construction and alterations (items 11 and 12 above). Copies of the UFAS may be obtained by contacting

Architectural and Transportation Barriers Compliance Board (ATBCB)
1331 F Street, N.W., Suite 1000
Washington, D. C. 20004-1111
1-800-872-2253

The ATBCB will publish "Minimum Guidelines and Requirements for Accessible Design" and the Department of Justice will adopt these guidelines as the final accessibility standard for this law. You may wish to inquire concerning the status of the "Minimum Guidelines" and request a copy.

The Texas Governor's Committee for Disabled Persons is not a regulatory or enforcement body for the Americans with Disabilities Act. The U. S. Equal Employment Opportunity Commission (EEOC) and the U S Department of Justice (DOJ) have the responsibility for formulating regulations by July 26, 1991, to carry out the Employment (Title I) and the Public Accommodations, except transportation, (Title III) sections of the law. **Taking actions as outlined in this guide will not necessarily assure compliance with the final regulations, but will assist with actions in the right direction.** This Self-Evaluation Guide is a tool for identifying and eliminating potential problem areas identified in the law.

Partial List Of Disability Groups To Include In Your Self-Evaluation Team:

- a person who uses a wheelchair
- a person with a vision impairment
- a person with a hearing impairment
- a person with a learning disability
- a person with speech or motor coordination difficulty

The following may help identify local organizations for people with disabilities to assist you with your self-evaluation:

Local Center for Independent Living (call the Governor's Committee for a CIL in your area)

[The Centers for Independent Living and Coalition of Texans with Disabilities have persons experienced in consulting on Self-Evaluation under Section 504 of the Rehabilitation Act of 1973, as amended]

- United Way (local offices throughout the state)
- Mayor's Committee for People with Disabilities (call the Governor's Committee for contact information)

"Quick Look" Barriers Checklist

This checklist is designed to give businesses a quick appraisal of potential problem areas for accessibility. For detailed review standards contact the Architectural and Transportation Barriers Compliance Board at 1/800/872-2253 and/or obtain a copy of the Uniform Federal Accessibility Standards for current specifications.

ITEM TO BE PERFORMED	YES	NO
Building Access		
1. Are 96" wide parking spaces designated with a 60" access aisle?	___	___
2. Are parking spaces near main building entrance?	___	___
3. Is there a "drop off" zone at building entrance?	___	___
4. Is the gradient from parking to building entrance 1:12 or less?	___	___
5. Is the entrance doorway at least 32 inches?	___	___
6. Is door handle easy to grasp?	___	___
7. Is door easy to open (less than 8 lbs. pressure)?	___	___
8. Are other than revolving doors available?	___	___
Building Corridors		
1. Is path of travel free of obstruction and wide enough for a wheelchair?	___	___
2. Is floor surface hard and not slippery?	___	___
3. Do obstacles (phones, fountains) protrude no more than four inches?	___	___
4. Are elevator controls low enough (48") to be reached from a wheelchair?	___	___
5. Are elevator markings in Braille for the blind?	___	___
6. Does elevator provide audible signals for the blind?	___	___
7. Does elevator interior provide a turning area of 51" for wheelchairs?	___	___
Restrooms		
1. Are restrooms near building entrance/personnel office?	___	___
2. Do doors have lever handles?	___	___
3. Are doors at least 32" wide?	___	___
4. Is restroom large enough for wheelchair turnaround (51" minimum)?	___	___
5. Are stall doors at least 32" wide?	___	___
6. Are grab bars provided in toilet stalls?	___	___
7. Are sinks at least 30" high with room for a wheelchair to roll under?	___	___
8. Are sink handles easily reached and used?	___	___
9. Are soap dispensers, towels, no more than 48" from floor?	___	___
Personnel Office		
1. Are doors at least 32" wide?	___	___
2. Is the door easy to open?	___	___
3. Is the threshold no more than 1/2" high?	___	___
4. Is the path of travel between desks, tables wide enough for wheelchairs?	___	___

Credits

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The Texas Governor's Committee for Disabled Persons is in compliance with the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and is an equal opportunity employer.

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for Disabled Persons